SUPREME COURT, U. S.

FILED
DEC 2 4 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 74

CARL PICCIOLI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES HANKEN
PHILIP BAROFF
240 Fairfield Avenue
Bridgeport, Connecticut

ALFRED BELINKIE
1016 Broad Street
Bridgeport, Connecticut

Counsel for Petitioner

INDEX

	PAGE
Opinions of the Court Below	1
Statement of Jurisdiction	2
Questions Presented	2
Statutes, Rules, Constitutional Provisions, and Regulations Involved	3
Statement of the Case	8
Statement of Facts	9
Reasons for Granting the Writ	13
Conclusion	29

Table of Authorities

Cases:

Acklen v. State of Tennessee, 267 S. W. 2d 101 (Tenn. 1954) 17

Albertson v. Subversive Activities Control Board, 34 U. S. L. Week 4014 ..... 14, 15, 16

Bollenbach v. United States, 326 U. S. 607 (1945) 21

Brotherhood of Carpenters v. United States, 330 U. S. 395 (1946) 19

Hargrove v. United States, 67 F. 2d 820 (5 Cir. 1933) 22

Hoffman v. United States, 341 U. S. 479 (1951) 15

PAGE

Ingram v. United States, 360 U. S. 672 (1959) 23, 24

Lewis v. United States, 348 U. S. 419 (1955) 2, 13, 14, 15, 18

Malloy v. Hogan, 378 U. S. 1 (1964) 14, 15, 17
Marshall v. United States, 360 U. S. 310 (1959) 29
Murdock v. United States, 290 U. S. 389 (1933) 13
Murphy v. Waterfront Commission of New York, 378 U. S. 52 (1964) 18

Starr v. United States, 153 U. S. 614 (1893) 21
State v. Devine, 149 Conn. 640, 183 A. 2d 612 (1962) 17
State v. McLaughlin, 132 Conn. 325, 44 A. 2d 116 (1945) 17

Townsend v. Burke, 334 U. S. 736 (1947) 26

United States v. Calamaro, 354 U. S. 351 (1957) 26
U. S. v. Fagundes, 340 F. 2d 673 (1 Cir. 1965) 19, 20, 22
U. S. v. Grassia, —— F. 2d —— (1965) 27
United States v. Kahriger, 345 U. S. 22 (1953) 2, 13, 14, 15, 18, 25, 27
U. S. v. Kelly, 119 F. Supp. 217 (D. C. D. C.) 20
United States v. Lo Biondo, 135 F. 2d 130 (2 Cir. 1943) 18, 19
United States v. Martell, 199 F. 2d 670 (3 Cir. 1952) 22
United States v. McGonigal, 214 F. Supp. 621 (1963) 24
United States v. Mungioli, 233 F. 2d 204 (3 Cir. 1956) 16
United States v. Murdock, 290 U. S. 389 (1933) 22
United States v. Palermo, 259 F. 2d 872 (3 Cir. 1958) 22
United States v. Rabinowich, 238 U. S. 78 (1915) 17
United States v. Spies, 317 U. S. 492 (1943) 13, 22
U. S. v. Viale, 312 F. 2d 595 28

PAGE

U. S. CONSTITUTION:

Fifth Amendment 6, 14, 28
Sixth Amendment 7
Tenth Amendment 7, 28

STATUTES:

68A Stat. 525 (1954), 26 U. S. C. § 4401 (1958) 3
68A Stat. 527 (1954), 26 U. S. C. § 4411 (1958) 4, 16, 22
68A Stat. 527 (1954), 26 U. S. C. § 4412 (1958) 4, 16, 22
68A Stat. 732 (1954), 26 U. S. C. § 6011 (1958) 6, 16
68A Stat. 851 (1954), 26 U. S. C. § 7203 (1958) 5, 22

26 C. F. R. § 44.4412-1(B)(2) 7, 17

Connecticut General Statutes, 1958 Rev.

Sections 53-271 to 53-279 16
Sections 53-295 to 53-297 16
Section 54-197 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

CARL PICCIOLI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Carl Piccioli, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on October 29, 1965.

Opinions of the Court Below

The opinion of the Court of Appeals, as yet unreported, is printed in the Appendix to this Petition (P.A. 1a).[1] The opinions in *U.S.A.* v. *Grassia,* Docket No. 29791 in

[1] References are indicated as follows:
References to the numbered pages of petitioner's appendix (P.A. —a).
Reference to the numbered pages of the appendix to Court of Appeals (A. —a).
References to the numbered pages of the record (R. —).

the Court of Appeals, *U.S.* v. *Costello, Marchetti* and *Gjanci,* Docket No. 29524 in the Court of Appeals, *U.S.* v. *Costello,* Docket No. 29525 in the Court of Appeals, *U.S.* v. *Marchetti,* Docket No. 29526 in the Court of Appeals, and *U.S.* v. *Gjanci,* Docket No. 29527 in the Court of Appeals, related cases, also are printed in the Appendix (P.A. 28a, 36a, 13a).

Statement of Jurisdiction

The judgment of the Court of Appeals was entered on October 29, 1965. Petitioner's Petition for rehearing was denied on November 26, 1965. This Petition is filed within 30 days after the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Should *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax laws here involved, be reconsidered by this Court in the light of recent decisions?

2. May petitioner's refusal to answer questions after his arrest upon the advice of his lawyer, be questioned by a judge thereby permitting the jury to draw adverse inferences from his reliance upon his constitutional right to silence and to the advice of counsel?

3. Is one act of passing $2.00 to a special agent in a closed palm, while looking up and down a bar, enough evi-

dence to infer knowledge of the tax laws and thereupon to infer a willful violation of those laws?

4. Assuming, *arguendo*, the continued validity of cases upholding the constitutionality of the wagering tax laws, were the statutes applied and enforced against petitioner in an unconstitutional manner or so as to violate the proper standards for the enforcement of federal criminal law under this Court's supervisory powers?

Statutes, Rules, Constitutional Provisions, and Regulations Involved

68A Stat. 525 (1954), 26 U.S.C. § 4401 (1958): *Imposition of tax*

(a) Wagers—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who con-

ducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

68A Stat. 527 (1954), 26 U.S.C. § 4411 (1958): *Imposition of tax*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

68A Stat. 527 (1954), 26 U.S.C. § 4412 (1958): *Registration*

(a) Requirement—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under sub-

chapter A, the name and place of residence of each such person.

(b) Firm or company—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

68A Stat. 851 (1954), 26 U.S.C. § 7203 (1958): *Willful failure to file return, supply information or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

68A Stat. 732 (1954), 26 U.S.C. § 6011 (1958): *General requirement of return, statement, or list*

(a) General rule.—When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

Amend. V, U.S. Const.: *Capital Crimes; Double Jeopardy; Self-incrimination; Due Process; Just Compensation for Property.*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amend. VI, U.S. Const.: *Jury Trial for Crimes, and Procedural Rights.*

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amend. X, U.S. Const.: *Reserved Powers to States.*

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

26 C.F.R. § 44.4412-1 (B)(2): *Registration.*

> (2) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked "Supplemental," each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10

days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see § 44.4905-2.

Statement of the Case

An indictment was returned against petitioner on October 6, 1964 and he was arrested on October 8, 1964 in a massive raid throughout Bridgeport, Connecticut. On October 8, 1964, a press release which had previously been given to newsmen, announced that approximately forty-five persons engaged in various gambling activities were arrested in a spectacular thrust at the extensive gambling activities in this area, by seventy-five special agents aided by fifty State Policemen. Extensive newspaper, radio and television coverage prevailed in Bridgeport and elsewhere in Connecticut. Statements by the Chief Assistant United States Attorney such as the government "had broken the back of gambling" in Bridgeport were reported in the Bridgeport Post.

On November 30, 1964 approximately forty-seven gambling cases were assigned for trial at Bridgeport, and four juries including petitioner's were selected on November 30th and December 1st from the same panel of veniremen. All four cases involved similar substantive charges of gambling tax violations and the same Internal Revenue Agent was the chief government witness in the first three cases. Petitioner's jury was then excused until the trial of Costello, Marchetti, and Gjanci was completed (P.A. 3a). On December 15, 1964, prior to the commencement of trial peti-

tioner moved that his jury which was impaneled on December 1, 1964 be dismissed and a new jury be impaneled or the case be continued because of prejudicial publicity. The motion was denied. (P.A. 3a)

The jury returned a verdict of guilty on both counts of the indictment. Petitioner was sentenced to: Imprisonment for one year on Count 1 and a fine of $5,000. Imposition of sentence was suspended on Count 2 with probation for two years, to start upon date of release from imprisonment. Execution of sentence stayed 24 hours. Petitioner filed motions for judgment of acquittal or new trial. The motion was denied. (A. 7a) On January 12, 1965 petitioner's notice of appeal was filed. (A. 7a) The Second Circuit Court of Appeals affirmed the judgment (P.A. 1a) and petitioner's motion for rehearing was denied.

Statement of Facts

The testimony disclosed that a special agent of the Internal Revenue Service had put wagers in with the petitioner by telephone on numerous occasions and in person on several other occasions. These activities occurred between July 27, 1964 and September 16, 1964. The agent first met petitioner personally on September 3, 1964, and his investigation ended on September 16, 1964. Petitioner was the permittee and part owner of a restaurant-bar known as the Pin-Up Restaurant. It was located in the business area of Bridgeport and was a successful establishment, catering to businessmen, lawyers and police officers.

As a result of the agent's investigation petitioner was arrested in a raid at his restaurant on October 8, 1964 for the alleged gambling tax violations.

During direct-examination, Agent Macolini, in an unresponsive answer, testified as follows: (A. 100a)

* * * * * *

"Q. Thank you very much. Now *after you made your search* of the premises at the Pin-Up Restaurant, what, if anything happened at that point? (Italics ours.)

A. Well, *before we started our search,* I told the defendant's attorney and the defendant I would like to ask him a few personal history questions. (Italics ours.)

Mr. Hanken notified me that he had instructed his client not to answer any questions. And I explained to Mr. Hanken I would need history questions from the defendant, and let him examine my questionnaire sheet.

He allowed the defendant to answer those personal history questions that were on the sheet."

No objection was raised by Petitioner to the answer given by Macolini nor was any reference made to this by either counsel during the remainder of direct, cross, redirect and recross.

After Macolini concluded his testimony and over objection, the trial court proceeded to question Macolini: (A. 105a-107a)

* * * * * *

"(307)

By the Court:

Q. And the second thing I wanted to ask you, Mr. Macolini, after you had executed the arrest warrant, that is, after you had placed Mr. Piccioli under arrest, did you attempt to ask him questions?

Mr. Hanken: I object, your Honor.

By the Court: What I am getting at is this.

If I understood your testimony, you said that you attempted to conduct an interview with the defendant. His attorney, Mr. Hanken, instructed him not to answer questions except that, pursuant to Mr. Hanken's permission, you did ask the defendant certain personal history questions.

(308)

Is that it in a nutshell?

A. Yes, sir.

Q. But the defendant was instructed in your presence

Mr. Hanken: Your Honor—

By the Court:

Q. —by Mr. Hanken, not to answer any questions with respect to whether or not he was accepting horse wagers on the premises?

A. Yes, sir.

Mr. Hanken: Your Honor, I want to object to all these questions and answers.

I think the jury has got an implication that there is no constitutional right here involved.

He had a constitutional right not to answer.

Mr. Moskoff: Excuse me, your Honor—

Mr. Hanken: I asserted that right for him.

These types of questions should not be asked. At this time it is extremely prejudicial.

The Court: I will hear Mr. Moskoff.

Mr. Moskoff: Your Honor, I would request your Honor direct Mr. Hanken, if he is going to argue, that he argue in the absence of the jury; that there is a time for speech making and this is not the time.

(309)

The Court: I will say to the jury this is my responsibility. I think I have some responsibility in presiding, in the conduct of a criminal case.

There were certain questions asked as to the investigation Mr. Macolini conducted, including the asking of questions or the attempting to ask questions of the defendant at the time of the arrest on the premises of the Pin-Up Bar.

I simply wanted to get it clear in my mind, and I assume the jury did also, as to precisely what happened.

And I think Mr. Macolini has made it clear as to what happened as he has responded to my questions.

Now I *will* say to the jury that, once the defendant was placed under arrest, it was his privilege under the Constitution not to answer any questions that might tend to incriminate him under Federal law. I assume that advice was given and, pursuant to that advice of his counsel, the defendant exercised that privilege.

What brought the question on my part was, I was not quite sure what was meant by personal history questions, as distinguished from whatever questions he declined to answer.

(310)

Now if counsel wish to ask any further questions, as a result of the Court's questions, you are at liberty to ask them.

Mr. Hanken: I am afraid not, your Honor. I just wanted the record to note my objection to all your statements and answers thereto. They were extremely prejudicial.

Reasons for Granting the Writ

1. Because this Court's decisions in *United States* v. *Kahriger*, 345 U.S. 22 (1953) and *Lewis* v. *United States*, 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax statutes, are in conflict with later decisions of this Court.

2. The Court permitted the jury, by its questioning of a witness, to draw inferences of guilt from petitioner's constitutional right to silence upon arrest and upon his reliance on his right to the advice of counsel, and this fundamental breach of petitioner's constitutional rights warrants review of his wrongful conviction.

3. The decision of the Court below has rendered meaningless the elements of "specific wrongful intent" and "evil motive" required by *Murdock* v. *United States*, 290 U.S. 389 (1933), and *United States* v. *Spies*, 317 U.S. 492 (1943) with regard to Section 7203 offenses.

4. The conscious generation of massive pre-trial publicity by the government combined with the statements of the district court created a situation which only this Court can correct by exercising its power of supervision.

I.

"Are you engaged in the business of accepting wagers on your own account?"

"Do you receive wagers for or on behalf of some other person or persons?"

It is for his failure to answer these and more detailed inquiries contained in Internal Revenue Form 11-C (A. 31a) that petitioner has been subjected to a one year prison sentence and a $5,000.00 fine (A. 11a). As Mr. Justice Black commented in a dissent a decade ago, if a compelled response to these questions

> ". . . would not violate the Fifth Amendment privilege against self-incrimination, it is hard to think of anything that would." *Lewis* v. *United States, supra,* 348 U.S. at 425.

In rejecting petitioner's contention that the self-incrimination clause of the Fifth Amendment protected petitioner, in the wagering tax context, from having to make any statements save those that "cannot possibly have such tendency to incriminate," *Malloy* v. *Hogan,* 378 U.S. 1, 12 (1964), the court below relied squarely upon *Kahriger* and *Lewis.* While noting, by reference, in its opinion on rehearing that *Albertson* v. *Subversive Activities Control Board, supra,* may lead this Court to overrule *Kahriger* and *Lewis* "insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination," the court felt that the issue was appropriate only for this Court's determination (P.A. 26a).

What petitioner urges is a reappraisal of *Kahriger* and *Lewis* in the light of *Malloy* and *Albertson*.

Significantly, *Kahriger* and *Lewis* were decided without mention of the doctrine this Court firmly established in *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951): that the privilege against self-incrimination "not only extends to answers that would in themselves support a conviction . . . , but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute . . . ," and without reference to the specific information sought by the Internal Revenue Service form involved here. *Malloy* reemphasized the link-in-the-chain principle ignored in *Kahriger* and *Lewis; Albertson* emphasized the questions on the Justice Department registration form, the I.R.S. counterpart of which is involved here and had been ignored in *Kahriger* and *Lewis*.

In *Kahriger* and *Lewis*, the wagering tax statutes were upheld because the Court felt they operated only prospectively and were, therefore, non-compulsory. 345 U.S. at 32, 33; 348 U.S. at 422. But by similar reasoning the *Albertson* registration provisions would have been held valid, since individual Communist Party members could terminate their membership within 30 days after entry of a § 786(a) order directed to the Party, 34 U.S.L. Week at 4014, and thus avoid individual registration. Yet this Court invalidated the registration provisions in *Albertson*, and its comments in so doing are equally applicable to the wagering tax statutes and undermine the rationale of *Kahriger* and *Lewis*:

> "The risks of incrimination which the petitioners take in registering are obvious. Form IS-52a requires an admission of membership in the Communist Party.

> Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act . . . or under § 4(a) of the Subversive Activities Control Act . . . , to mention only two federal criminal statutes. . . . It follows that the requirement to accomplish registration by completing and filing Form IS-52a is inconsistent with the protection of the Self-Incrimination Clause." *Albertson* v. *S.A.C.B., supra,* 34 U.S.L. Week at 4016.

Here, too, the risks of incrimination are obvious. For petitioner to pay the tax required by 26 U.S.C. § 4411, thereby admitting that he was engaged in wagering, he would also be required, by 26 U.S.C. §§ 4412 and 6011, to furnish on I.R.S. Form 11-C the name and address "where each such business is conducted" and the "name and address" of each employee engaged in receiving wagers.[1]

Disclosure in response to these questions, if not an outright admission of violations of some or all of Connecticut's anti-wagering laws, §§ 53-271 to 53-279, 53-295 to 53-297 (Conn. Gen. Stat., 1958 Rev.) or its criminal conspiracy

---

[1] These questions and the more detailed inquiries are contained on I.R.S. Form 11-C which is *both* a special tax return and application for registry, which petitioner would have had to complete in order to pay the special tax prescribed by § 4411 and avoid conviction. By virtue of 26 U.S.C. § 6011(a):

> ". . . Every person required to make a return or statement shall include therein the information required by such forms or regulations."

The Commissioner of Internal Revenue refuses to accept receipt of the $50 for the stamp without the information required by Form 11-C. The fact that a defendant tenders payment which is refused is no defense to a subsequent prosecution for accepting wagers without payment of the $50 special tax. *United States* v. *Mungioli,* 233 F.2d 204, 205 (3 Cir. 1956).

statute, § 54-197 (Conn. Gen. Stat., 1958 Rev.),[2] would constitute at the very least a "link in a chain of evidence sufficient to connect" petitioner with such violations. 378 U.S. at 13.

Certainly the listing of employees and agents is tantamount to an admission that there has been an agreement with these persons to be employees or agents in the business of wagering.[3] And disclosure of the place of business in which wagering is carried on could lead authorities to a lease, purchase of real estate, or other rental agreement for the purpose of showing overt acts in furtherance of the conspiracy. *State* v. *McLaughlin,* 132 Conn. 325, 340, 44 A.2d 116, 123 (1945). The overt acts, of course, need not be successful toward accomplishing the object of the conspiracy, *State* v. *Devine,* 149 Conn. 640, 649, 183 A.2d 612, 616 (1962), and need not be criminal acts in themselves. *United States* v. *Rabinowich,* 238 U.S. 78, 86 (1915).

If response to the questions asked in *Malloy,* 378 U.S. at 13-14, involved the *possibility* of self-incrimination, compelled compliance with the statutes here involved would make self-incrimination under Connecticut law a practical *certainty.*

---

[2] In *Acklen* v. *State of Tennessee,* 267 S.W.2d 101 (Tenn. 1954), for example, the defendant was convicted of conspiracy to violate a state gambling statute solely on the evidence that he had purchased a tax stamp.

[3] 26 C.F.R. § 44.4412-1(b)(2) requires a person engaging or about to engage in the business of receiving wagers to submit the name of any "employee" or "agent" hired to receive wagers *within 10 days after that* "employee" is so engaged. The "employer," then, is forced to supply the name of someone who will admittedly be in a unique position to bear witness against him. And due to the 10 day delay permitted in the registration of such "employees," the information supplied would relate not only to future criminal act, but also to *past* criminal acts.

To leave *Kahriger* and *Lewis* standing in view of the nature of the self-incriminatory responses called for by the statutory scheme involved in the wagering tax laws is to leave clouded with doubt the proud assertion that the Fifth Amendment privilege reflects our "most noble aspirations." *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 55 (1964).

II.

The Court of Appeals in considering the prejudicial effect of the trial court's questioning of Macolini and his comments to the jury, held, *inter alia*, that petitioner's silence, "affords no fair ground for relevant inference," (P.A. 5a) and that the judge's question "was [thus] ill-advised." The court also agreed with petitioner that there was "no apparent reason" for the question, and finally, the error committed was not cured because the trial court's instruction was improper. (P.A. 6a)

Yet in the face of these most compelling reasons for reversal, it was decided that the trial court's error was harmless.

The court believed that since Macolini's answer was not objected to, nothing significant was added to it by the trial court's questioning of Macolini.

Yet in *United States* v. *Lo Biondo*, 135 F.2d 130 (2 Cir. 1943), an almost identical issue was involved. The court reversed the conviction, *although no objection was taken or motion to strike made*—to the admission of the officer's testimony. This same Second Circuit Court of Appeals held that "the requested charge that 'the jury should not consider it an indication of guilt or innocence' was equivalent to a motion to strike" 135 F.2d p. 132.

In the case at bar petitioner objected to the trial court's questions and Macolini's answers. However, directly on the heels of these objections, the court proceeded to charge the jury incorrectly on the law, since petitioner had the right not to answer any questions under any law and not only those *"that might tend to incriminate him under Federal law."* (Italics ours)

Even more serious, and again paralleling *Lo Biondo*, is the fact that after the trial, the trial court once more improperly charged the jury by not cautioning them "that the evidence was to be disregarded and no inference drawn therefrom." (P.A. 6a)

This "proper instruction" (P.A. 6a) was however, specifically included in petitioner's written requests to charge and was conspicuous by its absence.

> ". . . (A. 93, 94a) I charge you that the fact that the Defendant exercised this right must not be considered by you in any way whatever. You must not even refer to it in your deliberations."

The trial court not only erroneously eliminated the crucial rule of law from its charge but reviewed the prejudicial incident again in its summary of the evidence (A. 63a)

> "A failure to charge correctly is not harmless since the verdict might have resulted from the incorrect instruction." The *error is aggravated* by the failure to give the correct charge *upon request.*" (Italics ours)
>
> *Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 409 (1946).

Furthermore in the recent and similar case of *U.S.* v. *Fagundes,* 340 F.2d 673 (1 Cir. 1965) it was held that an

arresting officer's testimony as to a defendant's desire not to answer questions and to see his lawyer is admissible, even if objected to, since the testimony would be descriptive of the arrest.

In *Fagundes*, the Government later tried to impeach him after he took the stand, by questioning him as to why he didn't protest his innocence instead of refusing to answer questions and asking to see his lawyer. This *subsequent* questioning by the prosecutor was admitted over specific objection; however, the Appellate Court held this questioning to be improper, and that the Government could not even use this evidence for impeachment.

Furthermore, the Court's conclusion that nothing significant was added to what Macolini had said (P.A. 6a), is to ignore reality.

This testimony was brought out long before the trial court questioned Macolini. There was good chance that the jury didn't comprehend Macolini's remark or paid little attention to it. After all, the trial court's reason for the "ill-advised" question was that he wanted the jury to get clear in its mind and in his own as to precisely what happened. (A. 106a)

Petitioner respectfully submits that it is not the function of a trial court to help a jury determine why a defendant after arrest refuses to answer questions upon advice of counsel.

See *U.S.* v. *Kelly*, 119 F. Supp. 217 (D.C. D.C.).

The question put to Macolini by the Court was an utter distortion of his testimony, since the crucial phrase, "accepting horse race wagers," was never mentioned until the

trial court injected it. The words of the indictment were very likely rekindled in their minds by the question.

To worsen matters, the trial court made petitioner's counsel responsible for this episode in the eyes of the jury.

Lastly, the mere fact the trial court asked Macolini these completely irrelevant questions, using such incriminating phraseology, gives the answers infinitely more importance, than had the prosecutor done so.

> "The influence of the trial judge on the jury is necessarily and properly of great weight, Starr v. United States, 153 U.S. 614, 626, and *jurors are ever watchful of the words that fall from him.*" (Italics ours.)
>
> *Bollenbach* v. *United States,* 326 U.S. 607, 612 (1945).

"The trial judge's ". . . lightest word or intimation is received with deference and may prove controlling."

Starr v. *United States,* 153 U.S. 614, 626 (1893).

Thus, the trial court's treatment of the incident, ran the gamut from distorted, irrelevant and prejudicial comments to failures to charge correctly even after a correct charge was submitted.

Petitioner respectfully submits that "ill-advised" comments by a judge, which were his responsibility, (A. 106a) under all the facts of this case should mean prejudicial and not harmless error was committed, and as in *Lo Biondo,* a reversal of the wrongful conviction.

> "In the second place we think it reversible error to permit a jury to draw any inference adverse to one

accused of crime from his reliance upon his constitutional right to silence and to the advice of counsel. The right to silence on arrest is akin to the right to decline to take the witness stand in one's own defense. Hilton v. United States, 221 F.2d 338, 341-342 (C.A. 5, 1955)". *United States* v. *Fagundes*, 340 F.2d at pp. 666, 667.

III.

The Petitioner was convicted of willfully failing to purchase a $50.00 gambling tax stamp Sec. 4411 and willfully failing to register Sec. 4412 both in violation of Sec. 7203.

Willfullness is the essential element of the crime proscribed by Sec. 7203.

Where the statute simply denounces the doing of an act as criminal, especially in offenses mala prohibita, the law imputes intent; but where a statute denounces as criminal only its "willful" doing, specific wrongful intent, that is, actual knowledge of the existence of the obligation and a wrongful intent to evade it, is of the essence.

The taxpayer must possess an evil motive to defeat the payment of the tax which he knows to be due and mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by evil motive are not probative of willfullness.

United States v. *Murdock*, 290 U. S. 389 (1933);
United States v. *Spies*, 317 U. S. 492 (1943);
Hargrove v. *United States*, 67 F. 2d 820, 823 (5 Cir. 1933);
United States v. *Palermo*, 259 F. 2d 872 (3 Cir. 1958);
United States v. *Martell*, 199 F. 2d 670 (3 Cir. 1952).

It is the petitioner's contention that there was insufficient evidence of such willfullness to support his conviction under Sec. 7203.

The leading case of *Ingram* v. *United States,* 360 U.S. 672 (1959) has often been authority for the proposition, that knowledge of the gambling tax and willful failure to pay it may be inferred from evidence of a defendant's attempts to conceal the operation of a gambling enterprise.

A portion of the evidence supporting the decision in *Ingram* revealed the Defendants to be entrepreneurs of a vast and profitable gambling enterprise and that they had engaged with numerous others to operate a numbers game for three years. The participants used false license plates, took evasive routes to "check-up headquarters", used false names on occasions and attempted to bribe local law enforcement officers. Massive evidence of a gambling operation was uncovered, in addition, one of the Defendants was alleged to have stated that, "business is down to about $3,500.00 per day."

Viewing the evidence presented in the present case in the light of *Ingram,* it is apparent that the government failed in its proof of "willfulness."

In the instant case, there was no direct evidence to show that the petitioner knew of the gambling tax laws. The petitioner took the stand and his testimony revealed that he was a full-time permittee of a legitimate, thriving restaurant-bar business. His other duties included cooking, waiting on tables and cleaning up. His average work-week involved between 80 and 85 hours. The restaurant was located in the downtown business area and professional men, businessmen and policemen formed the bulk of his clientele. (A. 108-9a) As permittee, he was naturally sub-

jected to the rules and regulations of the State Liquor Commission. Special Agent Ripa indicated that at the time he commenced his investigation, petitioner was not suspected of being involved in gambling violations nor was his restaurant suspected of housing such activities. (A. 95-6a) Petitioner, 46 years of age, had worked all his life and had a commendable background. No criminal record, including gambling violations, was introduced against him when he testified. The evidence showed that at least three agents thoroughly and systematically searched the premises for approximately two hours after his arrest. Not a single betting slip, tally sheet or similar paraphernalia was found, and the various sporting publications seized, bore no markings. (A. 99a, 104a)

There was no showing by the government that the gambling tax was ever called to petitioner's attention, even indirectly, by Agent Ripa or anyone else or that gambling stamp requirements had ever been published in local newspapers.

The utter lack of evidence of concealment of a gambling operation, as viewed through *Ingram*, is perhaps best illustrated by the fact that his restaurant was an open, prosperous business and not the typical grocery or cigar store where clandestine gambling operations flourish under a false front.

United States v. *McGonigal*, 214 F. Supp. 621 (1963):

In short, the critical and substantial acts of concealment which have supported the slightest inferences of knowledge and willfullness in all previous gambling tax cases are conspicuously absent in this case.

The government has based its entire case on Agent Ripa's testimony that the petitioner gave him, on one occasion, $2.00 from his pocket with a closed palm (A. 95a), which testimony was partially contradicted by the petitioner. (A. 110a) Presumably, this act is the "evidence of furtiveness" referred to by the Court below. (P.A. 2a) The government thus claims to have established, beyond a reasonable doubt, that by virtue of this isolated, vague and inconclusive act the petitioner knew of the tax and was concealing a gambling operation.

The fact that this act was characterized by the agent to be "secretive" lends no dignity to such utterly indeterminative evidence of guilt. Indeed, the insignificance of this act is perhaps made even more graphic by the neglect of Agent Ripa to even mention it in his report, although numerous other innocuous events were specifically noted. (Ex. 28, A. 119a)

Petitioner respectfully submits that a finding of "willfulness" in this case would read the essence of the crime completely out of the statute and render meaningless the cases which gave this concept truth and vitality.

IV.

The conscious generation of publicity surrounding the events of October 8 is particularly significant because it demonstrates that the government was controlling conduct which the Constitution left to the responsibility of the states.

Although *Kahriger* upheld the constitutionality of these statutes as revenue measures, the Court was not confronted with vivid evidence, as appears in the instant case, of the

use of the statutes by the government and by the trial court as merely an assault on gambling in Connecticut.

In *United States* v. *Calamaro,* 354 U.S. 351, 358 (1957) this Court noted that, "The statute was passed and its constitutionality was upheld, as a revenue measure, and apart from all else in construing it we would not be justified in resorting to collateral motives or effects which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt."

Compared in the light of the foregoing is the remark of the trial court made prior to imposition of sentence upon Costello, Marchetti, Gjanci and Piccioli on January 11, 1965.

> "While it is true that these are tax cases, prosecutions authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling" (P.A.-6a).

This use by the trial court of improper, misplaced and incorrect, criteria as a basis for sentence was a clear denial of due process of law. *Townsend* v. *Burke,* 334 U.S. 736, 741 (1947).

Later, on February 8, before taking up the criminal calendar, the trial court commented at great length, (A. 17a-27a) (P.A. 7a) about "what has been accomplished by this latest federal crackdown upon gambling and organized crime".

It was Justice Frankfurter's opinion that these statutes were actually "verbal cellophane" which permitted Congress

to "control conduct which the Constitution left to the responsibility of the states". 345 U.S. p. 38.

Petitioner submits that this "verbal cellophane" has been stripped away in the instant case by the fashion in which the statutes were enforced by the government and by the trial court's statements "in the prosecutorial area beyond his function." (P.A. 8a)

Practically every phase of the mass arrests was calculated by the government to and did produce publicity which saturated the state of Connecticut, which the Court below characterized as "needless intensification" (P.A. 27a).

Prior to the commencement of the Marchetti, Costello and Gianci trials (P.A. 9a) counsel for Grassia, *United States* v. *Grassia*, —— F. 2d —— (1965) made the trial court keenly aware of the prejudicial pre-trial publicity which had been generated by the government (P.A. 26a) in his motion for dismissal of the indictment or a continuance. Subsequently, before Costello's trial began, his counsel moved for a mistrial because of prejudicial newspaper publicity, which motion was denied. (P.A. 17a) Later, on December 15, 1964, petitioner's trial commenced before a jury which was impanelled and sworn on December 1, 1964. Realizing that the same trial court was familiar with the pre-trial publicity relating to the events of October 8, 1964 and that the court was not favorably inclined to grant continuances because of such publicity, petitioner based his motion for a new jury panel or a continuance on the prejudicial publicity arising out of the previous trial. This motion was heard and denied on December 15, 1964, prior to the commencement of petitioner's trial. (A. 3a) Actually, under all these circumstances even if petitioner had formally referred to the publicity of October 8 as well as the

adverse publicity attending the Costello trial, it would not have caused the trial court to grant petitioner's request. In all probability, the request would still have been made in vain, and specific reference to the events of October 8, in his motion might, in that light, be deemed to have been unnecessary. See *United States* v. *Viale*, 312 F. 2d 595, 601.

Petitioner was consequently placed in the unique and unenviable position of having his jury impaneled and sworn, read the indictment, and then being released for two weeks, during which time his name was prominently mentioned on the front page in connection with the same activities he was subsequently to be tried for. (A. 116a) The newspapers even published the fact that petitioner had been subpoenaed by the government to testify in the first case (A. 117-118a) although he was never called upon to testify.

The jury in his case, having been selected, knowing his name and the gravamen of the charges against him could not help but be attracted to the detailed newspaper accounts of another gambling tax case, especially those which referred to petitioner. With news dissemination being so sophisticated and all pervading in our society, it is completely unreal to believe that at least one or more of the jurors was not prejudiced against petitioner, by information accrued from the news media or through family or friends.

Accordingly, in view of all the foregoing, petitioner submits that his conviction should be reversed on the basis that the statutes here involved, have been enforced both prosecutorily and judicially so as to control conduct which the Constitution has left to the States in violation of the Fifth and Tenth Amendments, or since there is every indication

that the government was the sole producing agent of the prejudicial publicity, on the basis of this Court's exercise of its supervisory power to formulate and apply proper standards for enforcement of the criminal law," *Marshall* v. *United States*, 360 U.S. 310, 313 (1959).

CONCLUSION

For these reasons, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgments of the court below.

Respectfully submitted,

CHARLES HANKEN
PHILIP BAROFF
240 Fairfield Avenue
Bridgeport, Connecticut

ALFRED BELINKIE
1016 Broad Street
Bridgeport, Connecticut

Counsel for Petitioner

SUPREME COURT, U. S.

FILED
DEC 24 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~19~~ 1967

No [redacted] ~~849~~ 4

CARL PICCIOLI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR PETITIONER CARL PICCIOLI

CHARLES HANKEN
PHILIP BAROFF
240 Fairfield Avenue
Bridgeport, Connecticut

ALFRED BELINKIE
1016 Broad Street
Bridgeport, Connecticut

Counsel for Petitioner

INDEX TO APPENDIX

	PAGE
Opinion of Court of Appeals in U. S. v. Piccioli	1a
Opinion of Court of Appeals in U. S. v. Costello, Marchetti and Gjanci	9a
Opinion of Court of Appeals in U. S. v. Grassia	24a

Opinion of Court of Appeals in *U. S.* v. *Piccioli*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 489—September Term, 1964.

(Argued June 8, 1965 Decided October 29, 1965.)

Docket No. 29521

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARL A. PICCIOLI,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of the District Court for Connecticut, William H. Timbers, *Chief Judge*, convicting appellant, after a verdict, on a two-count indictment charging violation of 26 U. S. C. §7302 by wilful failure to pay the special gambling occupational tax, 26 U. S. C. §4411, and to register, 26 U. S. C. §4412. Affirmed.

PHILIP BAROFF, Bridgeport, Conn. (Charles Hanken on brief), *for Appellant.*

HOWARD T. OWENS, JR., Assistant United States Attorney (Jon O. Newman, United States Attorney, District of Connecticut), *for Appellee.*

FRIENDLY, *Circuit Judge*:

Piccioli was charged in a two-count indictment with violating 26 U. S. C. §7302 by wilful failure to pay the special gambling tax, 26 U. S. C. §4411, and to register, 26 U. S. C. §4412, and was convicted on both counts before Chief Judge Timbers and a jury. He was sentenced on the first count to imprisonment for one year and a fine of $5,000; on the second, imposition of sentence was suspended and probation fixed at two years.

Piccioli was one of the proprietors of the Pin-Up Bar in Bridgeport. Special Agent Ripa of the I. R. S., testified (on cross-examination) that "Artie" Gjanci, a defendant in *United States* v. *Costello*, —— F. 2d —— (2 Cir. 1965), instructed that, through arrangement between himself and Piccioli, Ripa could place bets with Piccioli, and that, when doing this by phone, he should say "This is Bill for Artie." Thereafter Ripa placed numerous horse race bets with Piccioli. There was evidence of furtiveness on Piccioli's part in accepting Ripa's wagers and paying his winnings. During the October 8 raid described in the *Costello* opinion, Special Agent Macolini obtained nearly $500 in cash and checks from Piccioli's pockets, along with three issues of a horse racing publication used by bookmakers. On that occasion in one hour a Connecticut State Trooper engaged in the search of the Pin-Up Bar received 23 calls from persons who were seeking to ascertain odds or, as the jury could properly infer, were about to place bets. Since this and other evidence warranted conviction, we turn to Piccioli's claims of error:

(1) Our *Costello* opinion details the publicity on October 8 and 9. When Piccioli was put to plea in New Haven on October 21, he requested that trial be had in Bridgeport, where the publicity had been most intense. On November

30 and December 1 four juries to try Piccioli's and other gambling cases were selected from the same venire, apparently with the understanding that the cases would be tried *seriatim*; the record shows no objection to that procedure and, when Piccioli's jury was being selected, the only venireman who recalled reading or hearing of his case was not chosen. His trial was adjourned until after that of Costello, Marchetti and Gjanci, which was widely publicized in the Bridgeport press. Piccioli's name figured in this, he being the "Carl" referred to in our opinion in that case; the papers reported he had been subpoenaed by the Government and had been excused at his lawyer's request. When Piccioli's case was called for trial on December 15, his counsel sought a new jury or a continuance because of the publicity given the Costello trial and Piccioli's involvement in it. The judge denied this but said he would inquire of the jurors, which he did without objection from counsel. When asked whether they had read or heard anything about the case or about Piccioli, there was no response.

In this aspect Piccioli's case is not significantly different from that of Costello, Marchetti and Gjanci. No objection on the score of the publicity on October 8 and 9 was made before the adverse verdict. The only issue relating to publicity which was brought to the judge's attention prior to trial was the newspaper accounts of the trial of Costello, Marchetti and Gjanci. A correct report of the trial and conviction of other persons for the same type of offense would not in and of itself be prejudicial, even when, as here, one of them figured in the evidence at the later trial; and there is no reason to suppose the jurors would read into the request that Piccioli be excused a claim of the privilege against self-incrimination. Moreover, we see no reason why the judge had to disbelieve the jurors' responses that the reports had not come to their attention.

(2) Another point has more merit but, in our view, not enough to demand reversal. Special Agent Macolini testified that after completing his search at the Pin-Up Bar, he told Piccioli and the latter's attorney, Mr. Hanken, who had entered the kitchen area in pursuit of a cup of coffee shortly after the raid, that he would like to ask "a few personal history questions"; that the attorney said he had instructed Piccioli not to answer questions; that Macolini then submitted his question sheet to Mr. Hanken; and that the attorney allowed Piccioli "to answer those personal history questions that were on the sheet." No objection was made to this, and the subject was not revived by counsel in cross, redirect, or recross examination. At the conclusion of Macolini's testimony, the judge reverted to this episode and, over objection by defense counsel, elicited an affirmative answer from Macolini to a question, "But the defendant was instructed in your presence by Mr. Hanken not to answer any questions with respect to whether or not he was accepting horse wagers on the premises." After listening to argument, the judge said, "I simply wanted to get it clear in my mind, and I assume the jury did also, as to precisely what happened," and then instructed "that, once the defendant was placed under arrest, it was his privilege under the Constitution not to answer any questions that might tend to incriminate him under Federal law . . . What brought the question on my part was, I was not quite sure what was meant by personal history questions, as distinguished from whatever questions he declined to answer." In submitting the case to the jury, the judge recounted Macolini's testimony and added that Mr. Hanken had a right to advise Piccioli not to answer questions and that Piccioli had a constitutional right not to do so.

Inquiry designed to establish that a defendant claimed the privilege against self-incrimination before a grand jury

or a legislative committee or failed to testify at a former trial has been held in several cases to constitute reversible error. See *Grunewald* v. *United States*, 353 U. S. 391, 415-24 (1957); *Stewart* v. *United States*, 366 U. S. 1 (1961); *United States* v. *Gross*, 276 F. 2d 816 (2 Cir. 1960). If the privilege attaches at the moment of arrest, as the judge assumed, inquiry to show its assertion at that time would seem equally banned.[1] And we would reach the same conclusion although that assumption is wrong and the right of an arrested person not to respond rests simply on the lack of any power in the police to compel testimony—a hotly controverted issue[2] which we need not here decide. Silence under such circumstances, at least when, as in this case, it results from the advice of an attorney, affords no fair ground for relevant inference, see *Kelly* v. *United States*, 236 F. 2d 746, 749 (D. C. Cir. 1956); yet a jury would be likely to give it not inconsiderable weight. As said by Mr. Justice Harlan in *Grunewald, supra*, 353 U. S. at 424, with respect to a claim of privilege before a grand jury, "the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used." Cf. *McCarthy* v. *United States*, 25 F. 2d 298 (6 Cir. 1928); *United States* v. *Pearson*, 344 F. 2d 430 (6 Cir. 1965).

---

1 Presumably this is what is meant by the statement in *Fagundes* v. *United States*, 340 F. 2d 673, 677 (1 Cir. 1965), characterizing the right to remain silent on arrest as "akin to the right to decline to take the witness stand in one's own defense." See also *Helton* v. *United States*, 221 F. 2d 338, 340-42 (5 Cir. 1955); but see *Kelly* v. *United States*, 236 F. 2d 746, 750-51 n. 10 (D. C. Cir. 1956).

2 See 8 Wigmore, Evidence §2252, at 328-29 & n. 27 (McNaughton rev. 1960); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 27-30 (1949); Note, The Privilege Against Self-Incrimination: Does It Exist in the Police Station?, 5 Stan. L. Rev. 457 (1953); 1 Morgan, Basic Problems of Evidence 146-48 (1961); Maguire, Evidence of Guilt §2.03, at 15-16 (1959).

The judge's question, for which the cold record affords no apparent reason, was thus ill-advised, to say the least. Nor was it cured, as the Government urges, by his subsequent instruction that the lawyer and Piccioli had been acting within their rights; the proper caution would have been that the evidence was to be disregarded and no inference drawn therefrom. But we cannot see that the question and answer added anything so significant to what Macolini had testified on his direct examination without objection as to afford sufficient basis for reversal, 28 U. S. C. §2111, F. R. Cr. P. 52(a).

(3) The final point requiring discussion is the contention that the judge took impermissible considerations into account in passing sentence.

Piccioli was sentenced on January 11, 1965, along with defendants in other gambling tax cases. In explaining the sentences in the *Costello*, *Marchetti* and *Gjanci* cases, Chief Judge Timbers made certain remarks which we set forth in part in the margin.[3] He followed these by recommending

---

3 "The Court regards these charges as serious. It is faced with the duty of imposing sentence following a finding of guilty by a jury.

"While it is true that these are tax cases, prosecutions authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling.

"While it is perfectly true, and no one knows better than the Court, that the charge against these defendants was not that of gambling, it is equally true that the prosecutions never would have been brought and there never would have been convictions but for extensive gambling and accepting of wagers as demonstrated by the evidence.

"As this Court has observed before, one of the handmaidens of vice in any community—here graphically demonstrated in the Bridgeport community—one of the handmaidens of vice is that of gambling. The other two, with which this Court has dealt severely and will continue to deal severely, are those of narcotics and prostitution. Of course it is

that the United States Attorney forward a transcript of them and of the evidence to Connecticut prosecutors. Later, on February 8, before taking up the criminal calendar in New Haven, Chief Judge Timbers made a further statement about the gambling tax cases with which he had been concerned. In this statement, some nine printed pages long, he praised the work of the United States Attorney and his staff, of the Intelligence Division of the Internal Revenue Service, and of the Connecticut State Police; deprecated the absence of cooperation by the local Bridgeport police and "the apparent lack of willingness or ability on the part of certain of the prosecutors (in one instance under the pretense of 'public apathy,' which is pure, unadulterated bunk) and judges of the state circuit court to back up the local and state police in enforcing the gambling laws of this state"; and noted "the ground swell of public support throughout the state for what has been accomplished by this latest federal crackdown upon gambling and organized crime." After announcing his intention to impose stiff sentences for violation of the federal gambling tax and related laws, he ended by proposing that a Connecticut Conference on Law Enforcement be convened, and outlined a detailed program for its membership and activities.

The circumstances under which an appellate court will interfere with a sentence within the permissible maximum because of the judge's reliance on allegedly irrelevant cri-

---

well known that the revenue from gambling is the financial basis or keystone upon which much of crime is built.

"The Court does not intend, in imposing sentence here, to deal out the slap on the wrist which has characterized sentences imposed by the State Courts for violations of the State gambling laws. The Court intends, by the sentences here to be imposed, to serve a stern warning, once again, as the Court has repeatedly in the past, that the United States is not powerless to deal effectively with violations of the Federal revenue laws and particularly the law here involved. It will do so, if need be, alone."

teria, see *United States* v. *Wiley*, 267 F. 2d 453 (7 Cir. 1959), are and, so long as such sentences are generally unreviewable, ought be rare. It would be wholly appropriate for the judge to look beyond Piccioli's failure to register and buy a $50 tax stamp and to consider the attendant substantial losses of revenue through his failure to pay the percentage tax on wagers, of which the judge had heard abundant evidence, even though that crime had not been charged. Cf. *United States* v. *Doyle*, —— F. 2d ——, —— (2 Cir. 1965). Piccioli's argument is thus reduced to the claim that the judge was enforcing not simply the federal laws which were his proper concern but state laws which were not. The record does suggest that the judge's indignation at what he had learned at the trials and from presentence reports may have led to statements in the prosecutorial area beyond his function. On the other hand, since he could have taken into account a record of state crimes and charges unrelated to the federal offense proved, it would be strange if he could not consider that the evidence showed a violation of state gambling laws and the effect of gambling on other state crime. Cf. *United States* v. *Doyle, supra.*

Piccioli's other points either are dealt with in *United States* v. *Costello* or lack sufficient merit for discussion.

Affirmed.

Opinion of Court of Appeals in *U. S.* v. *Costello, Marchetti and Gjanci*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 481/2/3/4—September Term, 1964.

(Argued June 8, 1965 Decided October 29, 1965.)

Docket Nos. 29524/5/6/7

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK COSTELLO, JAMES "TOTTO" MARCHETTI and ARTHUR GJANCI,

Appellants.

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK COSTELLO,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES "TOTTO" MARCHETTI,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

—v.—

ARTHUR GJANCI,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,
Circuit Judges.

Appeals from judgments of the District Court for Connecticut, William H. Timbers, *Chief Judge*, convicting appellants, after a verdict, of offenses under the federal wagering tax laws. Affirmed.

PHILIP R. SHIFF, New Haven, Conn. (Adrian W. Maher, on brief), *for Appellant Frank Costello.*

JACOB D. ZELDES, Bridgeport, Conn. (Francis J. King, David Goldstein, Joseph S. Catalano, on brief), *for Appellant Marchetti.*

CARROLL W. BREWSTER (Gumbart, Corbin, Tyler & Cooper, New Haven, Conn.) Kimberly B. Cheney, on brief), *for Appellant Gjanci.*

JON O. NEWMAN, United States Attorney (Howard R. Moskof, Assistant United States Attorney, on brief), *for Appellee.*

FRIENDLY, *Circuit Judge*:

These three appeals, along with *United States* v. *Piccioli*, —— F. 2d ——, and *United States* v. *Markis*, —— F. 2d ——, this day decided, stem from a raid carried out by Internal Revenue Service agents and state police in Bridgeport, Connecticut, on October 8, 1964. Appellants Frank Costello, James "Totto" Marchetti and Arthur Gjanci were tried together and convicted on all counts before Chief Judge Timbers and a jury under four indictments. Three two-count indictments similar in form charged each of them with violations of 26 U. S. C. §7203 in that, being engaged in the business of accepting wagers or receiving them for one so engaged, they wilfully failed (1) to purchase the occupational wagering tax stamp required by 26 U. S. C. §4411 and (2) to register as required by §4412. The fourth indictment charged all three with conspiring to fail to purchase the occupational tax stamps. Costello and Marchetti received concurrent one-year prison sentences and $10,000 fines in the conspiracy case and under Count 1 of their individual indictments; the imposition of sentence was suspended and probation for two years was imposed under Count 2. Gjanci's sentences differed in that the fine was $2,500.

Certain points are common to the three appeals and, to some extent, to the two others mentioned. After outlining the facts of this case, we shall deal first with these common points and then consider arguments peculiar to various appellants.

In the summer of 1964 Special Agent John Ripa of the I. R. S. was detailed to work in Bridgeport as an undercover agent, posing as a person wishing to make numbers and horse bets and later as a would-be bookmaker. He placed numerous bets with Gjanci and Marchetti at the

Lafayette Diner or, in some instances with respect to Gjanci, at the Greek Coffee House. On October 2, he placed bets with Costello, paying with two marked $20 bills which were found in Costello's pocket on the latter's arrest. Earlier, on September 3, he had asked Gjanci if he could set up an arrangement to turn in bets and receive a commission. Gjanci said he would speak to Marchetti to arrange this, and also that he would talk to his "bosses—Totto and Frank" about letting Ripa place bets at a local variety store; Gjanci referred to Costello as the "big boss of Bridgeport." On September 9, Marchetti arranged for Ripa to "book on 50%" with "Tony," with settlement to be made with Marchetti. On several later instances Costello made inquiries and gave directions whence the jury could infer that he was indeed "a boss"—if not indeed "the boss," in the enterprise. At trial Costello denied any involvement in the wagering business; Marchetti admitted accepting some bets from Ripa but denied others and also denied Costello's involvement; Gjanci did not testify.

I.

Appellants' most basic point concerns the constitutionality of the federal wagering tax. Recognizing that these provisions were sustained in *United States* v. *Kahriger*, 345 U. S. 22 (1953), appellants say their situation differs in two respects. One is that statements of the prosecutor and the judge demonstrated that the purpose of the Government's applying the statute against them was not to collect revenue, concededly the only available source of federal power, but to promote the enforcement of state laws against gambling; the other is that the enlargement of the self-incrimination clause of the Fifth Amendment to include federal compulsion of the admission of crime

against the states, see *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 53 n. 1, 77-78 (1964), overruling *United States* v. *Murdock*, 284 U. S. 141 (1931), and recent emphasis that the clause embraces all statements save those that "cannot possibly" tend to incriminate, see *Malloy* v. *Hogan*, 378 U. S. 1, 12 (1964), place the *Kahriger* holding on self-incrimination in question.[1]

With respect to the first contention, apart from questions as to what effect on constitutionality statements by prosecutors and judges can have, nothing in the present record goes materially beyond what the Supreme Court characterized in *Kahriger* as "suggestions in the debates that Congress sought to hinder, if not prevent, the type of gambling taxed." 345 U. S. at 27 n. 3. If "the verbal cellophane of a revenue measure," 345 U. S. at 38 (dissenting opinion of Mr. Justice Frankfurter), was sufficiently opaque for a majority of the Supreme Court twelve years ago, it remains so for us now. Whether the judge impermissibly allowed considerations unrelated to the nonpayment of the tax to enter into sentence, a claim raised only

---

1 Marchetti makes an additional argument based on the 1958 amendment, 72 Stat. 1304, which added to §4401(c) a provision that any person required to register under §4412 who receives wagers for or on behalf of another without having registered the name and residence of the latter as §4412(a)(3) requires, shall himself be liable for the tax on wagers to the extent of his receipts. He contends that since §4412 requires registration by persons required to pay the special tax by §4411 and §4411 requires such payment from anyone who is liable for the percentage tax under §4401 or is engaged in receiving wagers for or on behalf of a person so liable, a cross-reference to §4412 in §4401 necessarily renders the statute circular and unintelligible. We see no force in this argument. The 1958 amendment did not affect who was required to pay the special tax and to register, see 3 U. S. Code Cong. & Ad. News 4457 (1958); it simply made persons who failed to comply with the special requirement of §4412(a)(3) liable for the tax on wagers imposed by §4401, when they would not previously have been.

by Piccioli, is a different problem which we will discuss in the opinion in his case.

The contention with respect to the self-incrimination clause would be more serious if *United States* v. *Kahriger* stood alone, since whatever the stated basis for decision, the result followed so logically from the now-overruled *Murdock* doctrine. However, the Court again considered the Fifth Amendment objection in *Lewis* v. *United States*, 348 U. S. 419 (1955), which arose in the District of Columbia where wagering was a crime by federal law. The Court disposed of the argument on the basis that "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment." 348 U. S. at 422. If Congress can constitutionally require, as a condition to gambling, a registration that would show an intention to engage in a business prohibited by a federal law, we can think of no reason why it should not have the same power to require registration that would give notice of an intention to engage in activity made illegal by the laws of a state; and the probability of incrimination for future or even past acts, however great, is irrelevant on the Court's stated theory that the registration cannot be called compulsory. It is true that both *Kahriger* and *Lewis* were decided over vigorous dissents by Justices Black and Douglas on the Fifth Amendment point. But we find no subsequent opinion reflecting on the authority or reasoning of these cases and, at least under such circumstances, it is no proper function of ours to speculate on whether the dissent of yesterday may become the decision of tomorrow. Cf. *United States* v. *Zizzo*, 338 F. 2d

577, 580-81 (7 Cir. 1964), cert. denied, —— U. S. —— (1965); *United States* v. *Cefalu*, 338 F. 2d 582 (7 Cir. 1964). We are therefore not required to consider other arguments on which the Government might rely, such as the lack of any claim of the privilege at an earlier stage, see *United States* v. *Sullivan*, 274 U. S. 259, 263-64 (1927); *United States* v. *Kahriger*, *supra*, 345 U. S. at 32, and the required records doctrine, see *Shapiro* v. *United States*, 335 U. S. 1 (1948); Meltzer, Required Records, the McCarran Act and the Privilege against Self-Incrimination, 18 U. Chi. L. Rev. 687 (1951).

II.

Appellants contend their trial was rendered unfair by publicity, much of it emanating from the Government.

The indictments against appellants and others were returned in New Haven on October 6, 1964; bail was fixed but the indictments remained impounded, F. R. Cr. P. 6(e), until October 8 at 2:36 P.M. A press release distributed earlier by the Government to newsmen announced in part that at 1:20 P.M.: "In a spectacular thrust at the extensive gambling activities in this area, 75 special agents of the Intelligence Division, with the aid of 50 State Policemen, swooped down on some 40 establishments, arresting approximately 45 persons engaged in such gambling activities as policy numbers and betting on horse races and other sports events, in violation of the Federal wagering tax laws. . . . The special agents were successful in breaking up a large, syndicated operation including some of the most important higher-ups in the gambling syndicate." The release mentioned no names except for saying that appellants were charged with conspiracy, as well as with the two substantive counts employed against most other defendants, and

that Costello, Marchetti and a third man had bail fixed at $10,000, $5,000 and $5,000, respectively, while the figure for the other defendants was $2,500. The Government took the newsmen to the I. R. S. headquarters where the latter were able to photograph those who had been arrested as they were brought into custody. There was extensive newspaper, radio and television coverage on October 8 in Bridgeport and elsewhere in Connecticut. On the two following days, the Bridgeport press reported oral statements by Chief Assistant United States Attorney Owens to the effect that the Government had "broken the back of gambling" in Bridgeport, that funds from gambling were supporting prostitution, that housewives had called to express gratitude at the prospective curtailment of their husbands' aleatory propensities, and that Costello and Marchetti had previous convictions for income tax violation.

The last statement was improper by any standard and might well be a basis for reversal if appellants had moved for a change of venue or a continuance and this had been denied, and examination of the jurors had revealed recollection of these charges. *Marshall* v. *United States*, 360 U. S. 310 (1959); *United States ex rel. Brown* v. *Smith*, 306 F. 2d 596, 603 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963); see *Beck* v. *Washington*, 369 U. S. 541, 555-58 (1962). But appellants did not meet these essential conditions. Being put to plea in New Haven, trial counsel for Costello and Gjanci sought trial in Bridgeport where the publicity had peaked, Marchetti did not object, and no motion for a continuance was made. When the judge examined prospective jurors on November 30, only three of the panel said they had read or heard about the cases, and none of them were chosen. The attack because of the publicity here described came only in a motion in arrest of judgment after

the verdict. This was too late; counsel could not speculate on a favorable verdict and then claim lack of "an impartial jury" when the gamble failed.

Although another episode as to publicity was properly raised, the objection fails on the merits. On December 3, the first day of actual trial, defense counsel, out of the jury's presence, moved for a mistrial because of an article in the Bridgeport Post of December 1 which reported that "six more suspected gamblers arrested by federal agents last October today submitted guilty pleas" and that Owens said he expected others to change their pleas to guilty. At the request of the United States Attorney and with the consent of defense counsel, the court asked the jury, most of whom came from the New Haven area, whether any of them had read anything about the case or related cases since their selection as jurors. None responded, and the motion was denied. Appellants say the jurors' silence did not necessarily reflect the truth since the jurors would not be likely to admit they had violated the judge's previous instructions not to read about the gambling prosecutions. Whatever the force of such a contention might or might not be where publicity subsequent to the selection of the jury could be seriously prejudicial, cf. *United States* v. *Agueci*, 310 F. 2d 817, 831-33 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963), and cases there discussed, the December 1 article contained nothing that could deprive appellants of a fair trial. If one of appellants had pleaded guilty during the trial, the jury could have been so informed under proper caution. *United States* v. *Crosby*, 294 F. 2d 928, 948 (2 Cir. 1961), cert. denied, 368 U. S. 984 (1962); *United States* v. *Dardi*, 330 F. 2d 316, 332-33 (2 Cir.), cert. denied, 379 U. S. 845 (1964). In the light of that principle it is impossible to see what prejudice could result from a prediction that

other defendants, with no relation to appellants save having been seized in the raids of October 8, might change their not-guilty pleas.

III.

Ripa's testimony was received over a chorus of objections on the score of the hearsay rule. Whenever he testified as to a transaction or communication with one of the appellants, the others would object to its reception against them as hearsay; when he testified as to transactions or communications with other persons at the instance of one or more of the appellants, all three would object on that ground to its admission against any who were not present.

The objections betray a clear although common misconception of the nature of the hearsay rule. Only in a few instances was Ripa's testimony of declarations from which the jury was to accept the truth of the matter asserted, such as Gjanci's statement that Marchetti and Costello were his bosses. The basis for an objection in other cases, e.g., by Gjanci to testimony that Ripa had placed bets with Marchetti or with "Tony," is not at all that this is hearsay; the testimony of Ripa—himself on the stand subject to cross-examination—chiefly described acts, and no out-of-court utterance of Ripa, Marchetti or "Tony" was being offered to prove the truth of anything asserted in such utterance, 6 Wigmore, Evidence §1766 (3d ed. 1940); *Aikins* v. *United States*, 282 F. 2d 53, 57 (10 Cir. 1960); *United States* v. *Annunziato*, 293 F. 2d 373, 376-77 (2 Cir.), cert. denied, 368 U. S. 919 (1961). The proper objection is that, without more, Ripa's story as to a transaction with one person would not be relevant to prove the crime charged against another.

As the Supreme Court made clear in *Lutwak* v. *United States*, 344 U. S. 604, 617-19 (1953), there is a distinction

between acts and declarations with respect to admissibility. Out-of-court declarations of an alleged conspirator introduced to prove the truth of the matter asserted meet the obstacle of the hearsay rule; while always receivable against the declarant as an admission, they can be used against others, unless some other exception applies, only on independent proof of agency, see 4 Wigmore, *supra*, §1079, and the agency does not go beyond statements in furtherance of the conspiracy.[2] Evidence of an act (or a statement offered other than for its truth) has no special evidentiary hurdle to overcome and, whether the act is by a co-conspirator or third person and whether it occurs during the period of a conspiracy or not, the evidence is admissible so long as the act is probative of a crime charged against a defendant and the evidence is not excludable on some special ground.[3] Thus, the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with which he is to

---

2 Since by hypothesis the conspiracy and defendant's participation must be independently established before the hearsay may be used against him, one may wonder at first blush what role remains for the declaration. Making this point, Judge L. Hand in *United States* v. *Dennis*, 183 F. 2d 201, 230-31 (2 Cir. 1950) (dictum), aff'd, 341 U. S. 494 (1951), suggested that the conspiracy and participation questions be independently decided by the trial judge and the hearsay then given to the jury without limitation. But even if the judge, as in the *Dennis* trial and in the present case, charges that the jury must itself resolve this "preliminary" question beyond a reasonable doubt, the hearsay may still be useful to the prosecution, for example to characterize the conspiracy as to purpose or date, or as evidence that defendant engaged in another crime for which he is on trial. See generally McCormick, Evidence §245, at 522 n. 33 (1954).

3 Paralleling the hearsay exception in evidence law—indeed, its very foundation in Wigmore's view, 4 Wigmore, *supra*, §1079, at 127-31—is the debated contention that a defendant will be liable for the substantive crime of another upon independent proof that the actor was furthering a conspiracy in which defendant was a member. See Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 993-1000 (1959). No such instruction was given in this case.

be linked by quite separate proof. An act of any other conspirator during the alleged conspiracy and in furtherance of it almost inevitably meets this test, and, as held in *Lutwak*, acts by such others even before or after the period of the conspiracy may still be relevant in suggesting its existence and its aims. See *United States* v. *Ross*, 321 F. 2d 61, 68-69 (2 Cir.), cert. denied, 375 U. S. 894 (1963).[4]

Subject to a general point made by Costello which we will mention below, this discussion suffices to dispose of the objections of Marchetti and Costello to the admission of Ripa's testimony as to the placing of bets with Gjanci between July 23 and 31, on the ground that the court had ruled only that a sufficient showing of conspiracy had been made for the period beginning August 12.[5] Even more clearly it disposes of the objection of each appellant to testimony as to conversations and transactions between Ripa and other appellants and non-parties after August 12. Ripa's testimony that Marchetti had called "Tony" and

---

4 The briefs exhibit a common confusion in contending that evidence meeting the standard we have indicated would be admissible only under the conspiracy count; such evidence is admissible on substantive counts even when there is no conspiracy indictment at all. *United States* v. *Pugliese*, 153 F. 2d 497, 500 (2 Cir. 1945); *United States* v. *Annunziato*, *supra*, 293 F. 2d at 378; *United States* v. *Smith*, 343 F. 2d 847 (6 Cir. 1965).

5 We note also that although at the time of the admission of this evidence the court may have been satisfied only as to a conspiracy beginning August 12, other competent evidence later introduced warranted a finding that the conspiracy had existed from July 23 and, indeed, long before. Cf. *United States* v. *Dennis*, *supra*, 183 F. 2d at 231. The comments in the text and in this footnote apply also to the objection that the court allowed testimony as to acts subsequent to October 2, the last date to which the judge, in his initial ruling, had found the conspiracy extended. And there is nothing to Costello's special objection to the admission of evidence relating to acts on October 7, the day after the indictment had been found; the impounded indictment did not end the conspiracy, as the evidence obtained in the October 8 raids demonstrated.

arranged for Ripa to book with "Tony," with Ripa to settle up with him once a week, was plainly admissible against Marchetti and also against the other appellants so far as it might prove Marchetti engaged in a gambling conspiracy to which they might independently be linked. Gjanci's instructions that Ripa should bet with "Carl" and settle with him were admissible on the same basis. Once evidence of these instructions by Marchetti and Gjanci was admitted against appellants, Ripa's testimony that he had then placed bets with Tony and Carl was highly relevant; evidence that the names or telephone numbers led to a gambling enterprise tended to show that the man furnishing the information—and his independently linked co-conspirators—were part of that enterprise. Ripa, in the course of describing his transactions with the appellants and Tony and Carl, naturally told the jury what he himself said or did during the encounters, but this was not to charge his own behavior or statements to the conspirators but simply to provide the necessary context for understanding their conduct which he was relating. *United States* v. *Morello*, 250 F. 2d 631, 634 (2 Cir. 1957), relied on by appellants, simply held that an out-of-court declaration by an undercover agent acting as a conspirator could not be received against co-conspirators as their admission under the conspiracy exception to the hearsay rule. But as *Morello* itself indicated, the *act* of a co-conspirator was admissible for whatever it was worth against the defendants, although occurring outside their presence and without their knowledge, so long as their participation in the conspiracy was proved by independent evidence; and the undercover agent's description of his own conduct, apart from the use of his out-of-court statements for their truth, received no censure. 250 F. 2d at 634-35.

Costello argues there was no sufficient independent evidence to connect him with the conspiracy, stressing that Ripa did not meet him until September 14. However, Ripa's testimony as to what Costello said and did on that occasion and later amply justified a finding that Costello was one of the "bosses" and had been so from the outset. With the declarations of Gjanci as to Costello's role thus made competent, the contention that the Government failed to adduce sufficient evidence to warrant submission of Costello's case to the jury falls by the wayside.

A final objection relates to oral and written post-arrest statements by Marchetti, discussed in another context below. These were offered and received only against him. In his charge the judge said that the oral statements were received only against Marchetti, but that the written statement was received against all defendants in the conspiracy case although not in the substantive cases other than Marchetti's. No exception to the erroneous instruction was taken. It is plain that if one had been, the judge would have corrected his mistake. For reasons fully explained in *United States* v. *Kahaner*, 317 F. 2d 459, 478-79 (2 Cir.), cert. denied, 375 U. S. 836 (1963), we decline to notice the point.

IV.

As just indicated, Marchetti was interrogated after arrest by a Special Agent, who recorded his oral answers on a question sheet which Marchetti then signed. Apparently Marchetti was first warned of his right not to answer any questions but not of any right to confer with counsel. The agent's testimony and the question sheet were received in evidence against Marchetti without objection. After warning of his right not to answer questions that would incriminate him under federal law, another agent asked Gjanci if

he had a federal tax stamp and, this being answered in the negative, why not; Gjanci replied that he didn't accept wagers but "just play[ed] the numbers." No objection to this testimony was made.

Marchetti and Gjanci now urge that reception of this evidence violated their rights under the Assistance of Counsel clause of the Sixth Amendment as interpreted in *Massiah* v. *United States*, 377 U. S. 201 (1964), and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and under F. R. Cr. P. 5(a) as implemented by *McNabb* v. *United States*, 318 U. S. 332 (1943), and *Mallory* v. *United States*, 354 U. S. 449 (1957). The Government contends, *inter alia*, that Gjanci's statement was exculpatory (save as to his stipulated failure to have a tax stamp) and that Marchetti's failure to object was deliberate, since, there being overwhelming proof against him, his sole objective was to protect Costello, as the statement did. We find it unnecessary to examine these contentions. We held some years ago that we need not consider *McNabb-Mallory* objections not clearly made at trial, *United States* v. *Ladson*, 294 F. 2d 535, 538-39 (2 Cir. 1961), cert. denied, 369 U. S. 824 (1962). In the course of its *in banc* consideration of a number of cases involving *Massiah* and *Escobedo* claims arising out of trials after those decisions, the court has reached the same general conclusion, *United States* v. *Indiviglio*, —— F. 2d —— (1965), and we find no special circumstances warranting different action here.

We have carefully examined appellants' other claims of error but do not consider them to require discussion. The Court is indebted to Carroll W. Brewster and Kimberly B. Cheney, assigned counsel, for their presentation on Gjanci's behalf.

Affirmed.

Opinion of Court of Appeals in *U. S.* v. *Grassia*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—September Term, 1965.

(Argued October 28, 1965 Decided November 26, 1965.)

Docket No. 29791

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFRED GRASSIA,

Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Defendant, having been charged in a two-count indictment, in the District Court for Connecticut, with willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411, in violation of 26 U. S. C. §7203, changed his plea of not guilty to one of *nolo contendere* on one count, and appeals from the resulting conviction by Judge Clarie. Affirmed.

JACOB D. ZELDES (David Goldstein, Bridgeport, Conn., on brief), *for Appellant.*

JON O. NEWMAN, United States Attorney for the District of Connecticut, *for Appellee.*

FRIENDLY, *Circuit Judge*:

This is another appeal stemming from the raids relating to enforcement of the federal wagering tax at Bridgeport, Connecticut, on October 8, 1964. See *United States* v. *Costello*, —— F. 2d —— (2 Cir. 1965), *United States* v. *Piccioli*, —— F. 2d —— (2 Cir. 1965), and *United States* v. *Markis*, —— F. 2d —— (2 Cir. 1965). Alfred Grassia, represented by counsel and duly questioned by Judge Clarie at a term of the District Court for Connecticut at Hartford, to which, at his request, his case had been transferred for trial on his not guilty plea, pleaded *nolo contendere* to one count of a two-count indictment charging, under 26 U. S. C. §7203, willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411. The other count was then dismissed at the Government's request. His points on appeal from the resulting conviction fall into two categories. The first repeats the same constitutional attacks on the federal wagering tax statutes that were advanced in the earlier cases. His other point is that the conscious generation of publicity by the Government and statements by Chief Judge Timbers in the course of other proceedings in January and February, 1965, prior to Grassia's change of plea,[1] see *United States* v. *Costello*, *supra*, —— F. 2d at ——, slip opinion at 3325-26; *United States* v. *Piccioli*, *supra*, —— F. 2d ——, slip opinion at 3340-41, so prejudiced his opportunity for a fair trial that the indictment should have been dismissed.

The first group of contentions, challenging the constitutionality of the federal wagering tax statutes, survive the plea of *nolo contendere*, as the Government concedes. But, so far as this Court is concerned, they have been deter-

1 The judge's statements were the basis of one of several motions by Grassia to dismiss the indictment or for a continuance.

mined adversely to Grassia by *United States* v. *Costello, supra,* —— F. 2d ——, slip opinion, 3322-25. Recognizing that the rationale of *Albertson* v. *Subversive Activities Control Board,* —— U. S. —— (1965), announced subsequent to our *Costello* opinion, may lead the Supreme Court to overrule its previous decisions in *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination.

As to Grassia's other contention, that his right to a fair trial was compromised by adverse publicity, the United States concedes that, at the time of the change of plea and the dismissal of the second count, counsel made clear to the prosecutor and the court that Grassia intended to press the point on appeal, contrast *United States* v. *Doyle,* 348 F. 2d 715, 720 (2 Cir. 1965); but it urges that a claim of the impossibility of obtaining an impartial trial is necessarily foreclosed when the defendant, freely and with the assistance of counsel, decides not to have one. Grassia responds that a defendant cannot be required to undergo a trial which the prosecution or the court has forced to occur at a place or a time that is inconsistent with the guarantees of the Sixth Amendment. His point is that the Amendment guarantees not only trial by an impartial jury but a "speedy" trial in the district where "the crime shall have been committed." He says that when this has been made impossible by the Government, as distinguished from third parties, the conventional remedies of extended continuance or change of venue are inappropriate since these involve a sacrifice of Sixth Amendment rights, and the only suitable remedy is dismissal of the indictment, thus rendering in-

consequential any plea of *nolo contendere* and waiver of trial.

We do not find it necessary to consider whether a case might conceivably arise where the Government's conduct in generating publicity had been so egregious and the prejudice engendered by it so pervasive, cf. *Irvin* v. *Dowd*, 366 U. S. 717 (1961), that the drastic sanction of dismissal of the indictment would be demanded, in the interest of the particular defendant or for general therapeutic purposes, or for both. It suffices for decision here that the hurdle confronting any such claim must be exceedingly high and that Grassia does not come close to meeting it. Although we disapprove of what seems to have been needless intensification by the Government of the news of the arrests and, still more, of the unnecessary statements by the Chief Assistant United States Attorney on the two following days, see *United States* v. *Costello, supra,* —— F. 2d at ——, slip opinion, 3326, it proved possible to obtain impartial juries even at Bridgeport where the publicity was at its peak, see *United States* v. *Piccioli, supra,* —— F. 2d at ——, slip opinion, 3336-37; *United States* v. *Markis, supra,* —— F. 2d at ——, slip opinion, 3344. Criminal defendants are understandably prone to exaggerate the interest their fellow citizens take in matters of such acute concern to them. The transfer of Grassia's trial to Hartford, also within the "district," on December 4 on his request, although doubtless prudent, thus did not result from any demonstrated impossibility of obtaining a speedy trial by an impartial jury in Bridgeport.[2] And although the fact that defendants arrested in the October raid were still awaiting trial rendered Chief Judge Timbers' statement of February 8, 1965, even

---

2 As indicated in *United States* v. *Costello, supra,* —— F. 2d at ——, slip opinion, 3327, jury panels at the terms held in Bridgeport are not limited to residents of that city.

more ill-advised than we indicated in *United States* v. *Piccioli, supra,* ——F. 2d at ——, slip opinion, 3342, we are wholly unconvinced that this pronouncement, combined with the preceding publicity generated by the prosecutor and the judge, made it so plainly impossible to obtain an impartial jury in Hartford as to relieve Grassia of any need to develop the facts by adhering to his plea of not guilty and examining the venire at Hartford on a voir dire.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 849

CARL PICCIOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 352 F. 2d 856.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1965. Petition for rehearing was denied on November 26, 1965. The petition for a writ of certiorari was filed on December 24, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should reexamine, in light of *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, its holding in *United States* v. *Kahriger*, 345

208-146—66

U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, that the registration requirement of 26 U.S.C. 4412 does not violate the Fifth Amendment privilege against self-incrimination.

2. Whether this Court should reexamine its holding in *Kahriger* that the wagering tax provisions do not violate the Tenth Amendment.

3. Whether petitioner is entitled to a new trial because of pretrial publicity generated by his arrest.

4. Whether the evidence was sufficient to support the jury's finding that petitioner's violations of 26 U.S.C. 4411 and 4412 were willful.

5. Whether, after a government witness testified without objection that petitioner had refused, on the advice of counsel, to answer questions when he was arrested, the trial judge committed reversible error by clarifying this testimony and by subsequently refusing to give a particular cautionary instruction in his charge.

STATEMENT

Petitioner was convicted on a two-count indictment charging him with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by 26 U.S.C. 4412. He was sentenced to imprisonment for one year and fined $5,000 on the first count, and received a suspended sentence and probation for two years on the second count.

ARGUMENT

1. Petitioner was one of approximately forty-five individuals arrested on October 8, 1964, in connection with violations of the wagering tax statute in the Bridgeport, Connecticut, area. His contentions here in regard to the asserted unconstitutionality of the statute when measured against the Fifth and Tenth Amendments are the same as those raised in the petitions filed this term by James Marchetti (No. 823), Frank Costello (No. 826) and Arthur Gjanci (No. 1028 Misc.), and are treated in our combined brief in answer to those petitions. See also *United States* v. *Angelini*, 346 F. 2d 278 (C.A. 7), certiorari denied, 382 U.S. 838. Our answer in that brief to the contention in regard to prejudicial pretrial publicity also applies here. Indeed, unlike the petitioners in Nos. 823, 826, and 1028 Misc., petitioner here was not personally named in the press release announcing the arrests. In addition, like the petitioners in Nos. 826 and 1028 Misc., petitioner here affirmatively requested trial in Bridgeport, where the arrests had taken place and publicity had been the most intense (Pet. App. 2a).[1]

[1] Petitioner also complains of the denial of his pretrial motion for a new jury panel or a continuance because of publicity arising out of testimony given during the prior trial of Marchetti, Costello and Gjanci, in which petitioner's name was prominently mentioned (Pet. 27–28). However, inquiry by the trial judge of the jurors who tried petitioner revealed that none of them had read or heard about him or the prior case (Pet. App. 3a).

2. Petitioner was the co-proprietor of a bar and restaurant in downtown Bridgeport. An agent of the Internal Revenue Service, acting in an undercover capacity, made arrangements with Arthur Gjanci (the petitioner in No. 1028 Misc.) whereby the agent could place wagers by telephone with petitioner. The agent was instructed by Gjanci that in doing so he should say "This is Bill for Artie" (Pet. App. 2a). When the agent first called petitioner, the latter hesitated on the telephone; when he finally accepted the wager he told the agent that he had to get to know his voice (R. 71; G. App. 8a).[2] After placing a large number of wagers by telephone, the agent was introduced by Gjanci to petitioner, who requested that more "action" be sent to him and who stated that he intended opening another place to expand his gambling operation (R. 64, 67, 124–125).

Thereafter, the agent placed wagers with petitioner at his bar. In accepting them, petitioner would look up and down the bar to make certain that he was not being observed (R. 52, 97, 122, 123, 149; G. App. 8a–10a), and on one occasion he paid the agent his winnings by passing him the money "in a secretive manner with his hand clasped" (R. 122; G. App. 10a). When petitioner was arrested, he had in his pockets $495.15 in cash and checks and

[2] "R." indicates the trial transcript contained on the record on appeal in the court of appeals; "G. App." indicates the government's appendix in the court of appeals.

three issues of a horse racing publication used by bookmakers (R. 216, 220). Nine other publications used by bookmakers were found on the premises (R. 233). During the hour after petitioner's arrest, one of the officers engaged in a search of petitioner's bar received 23 telephone calls from persons seeking to place wagers or to ascertain betting odds (Pet. App. 2a). Petitioner took the stand in his own defense and testified that he placed wagers himself but was not in the business of accepting them from others, and that as a favor he had placed the agent's wagers with his own bookmaker (R. 602; G. App. 6a).

The evidence thus abundantly established that petitioner, in a proprietary capacity, engaged in the business of receiving wagers on a large-scale and on a regular (rather than casual or intermittent) basis, that he carried on this business in association with others similarly engaged, and that he made efforts at concealing his operations. Since he offered no evidence that he lacked knowledge of the requirements of registering and obtaining a tax stamp, but based his defense instead upon the contention that he was not in the business of accepting wagers, the jury could properly infer that his failure to register and purchase the stamp was willful. *Ingram* v. *United States*, 360 U.S. 672, 677; *Edwards* v. *United States*, 334 F. 2d 360, 365–368 (C.A. 5), certiorari denied, 379 U.S. 1000; *United States* v. *Russo*, 335 F. 2d 299, 300–301 (C.A. 7), certiorari denied, 379 U.S. 962; *United States* v. *Marquez*, 332 F. 2d 162, 164–166 (C.A. 2), certiorari denied, 379

U.S. 890; *Evans* v. *United States*, 349 F. 2d 653, 657 (C.A. 5).

3. During the trial, a government agent testified, without objection, that petitioner's counsel, who had been present when petitioner was arrested, had instructed him not to answer any questions, but did, after examining the agent's questionnaire sheet, permit personal history questions thereon to be answered (R. 250–251; G. App. 11a). When the agent finished his testimony, the trial judge, in order "to get it clear in my mind * * * as to precisely what happened" (R. 276; G. App. 13a), inquired whether this meant that petitioner was instructed "not to answer any questions with respect to whether or not he was accepting horse wagers on the premises," and was informed that it did (R. 274–275; G. App. 12a). At this point counsel objected, saying, "I think the jury has got an implication that there is no constitutional right here involved. He had a constitutional right not to answer" (*ibid.*). The judge thereupon informed the jury that petitioner had acted within his constitutional rights, and asked whether counsel wished to inquire further of the witness. Counsel replied, "I just wanted the record to note my objection to all your statements and answers thereto. They were extremely prejudicial" (R. 276–277; G. App. 13a–14a). Counsel did not, at that point, request any cautionary instruction in regard to the

exchange. When the case was submitted to the jury, however, he requested an instruction that the fact that petitioner had exercised his constitutional rights was not to be considered in any way or referred to by the jury during its deliberations (Pet. 19). This instruction was not given; instead the judge, in the process of summing up the evidence, recounted the fact that petitioner, under his counsel's instructions, had answered only the personal history questions, and instructed that both he and counsel had acted within their rights (R. 594; G. App. 4a–5a).

As the court of appeals noted (Pet. App. 6a), the information elicited by the judge's inquiry added nothing of significance to the testimony which the agent had previously given without objection. In addition, the judge's question focused only upon petitioner's refusal to answer whether he was accepting wagers, an element of the offense which was amply established by testimony and other direct evidence. There was no suggestion on the part of either the judge or the government that the jury should make affirmative use of petitioner's reliance upon his right not to answer in inferring either guilt or willfulness or to question petitioner's credibility. Compare *Stewart* v. *United States*, 366 U.S. 1; *Grunewald* v. *United States*, 353 U.S. 391, 415–424; *Fâgundes* v. *United States*, 340 F. 2d 673, 677 (C.A. 1). Moreover, the only objection made at the time of the incident was that the judge's inquiry carried the implica-

tion that petitioner had no constitutional right not to answer the agent's questions. The judge immediately informed the jury that petitioner had acted fully within his rights and no further cautionary instruction was requested at that time. In these circumstances, the judge's failure to tell the jury in his final instructions that it should ignore his earlier inquiry and the response thereto can not be deemed to have had a prejudicial effect upon the outcome of the trial requiring reversal of the verdict.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

FEBRUARY 1966.

[3] Petitioner complains because the trial judge reviewed the incident again in his summary of the evidence (Pet. 19). The review, however, was necessitated by the request for an instruction concerning the incident.

U.S. GOVERNMENT PRINTING OFFICE:1966

FILED
JAN 13 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

JANUARY TERM, 1966

No. 1015

PELLEGRINO MILLO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

EDWARD G. BURSTEIN
JEROME GOLDMAN
177 State Street
Bridgeport, Connecticut
Counsel for Petitioner

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	3
Reasons for Granting the Writ	5
Conclusion	15

TABLE OF AUTHORITIES CITED.

Cases:

Acklen v. State of Tennessee, 267, S.W. 2d 101 (Tenn. 1954)	10
Alvertson v. Subversive Activities Control Board ....U.S..... (1965)	4, 5, 8, 9
Brunner v. United States, 343 U.S. 918	8
Hoffman v. United States, 341 U.S. 479 (1951)	7
Irving Blau v. United States, 340 U.S. 332	8
Lewis v. United States, 348 U.S. 419 (1955)	2, 4, 5, 6, 7, 8, 11
Malloy v. Hogan, 378 U.S. 1 (1964)	7, 11
Marshall v. United States, 360 U.S. 310. (1959)	14
Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964)	11
Patricia Blau v. United States, 340 U.S. 159	8
Quinn v. United States	8
Snowden v. Hughes, 321 U.S. 1 (1944)	12
State v. Devine, 149 Conn. 640, 183 A.2d 612 (1962)	10
State v. Nunes, 205 A.2d 24 (R. I. 1964)	15

PAGE

State v. McLaughlin, 132 Conn. 325, 44 A.2d 116 (1945) 10

Townsen v. Burke, 334 U.S. 736, 741 13

United States v. Calamaro, 354, U.S. 351 (1957) 11, 12, 13

United States v. Costello, et al., 2 Cir. October 29, 1965, Slip Sheets 3319 at 3322-3323 and Fn. 1 ..... 4, 5

United States v. Grassia, 2 Cir. November 26, 1965 ..... 4, 5

United States v. Kahriger, 345 U.S. 22 (1953) ..2, 4, 5, 7, 8, 11, 12

United States v. Marzano, 149 F.2d 923 (2 Cir. 1945) 14

United States v. Mungioli, 233 F.2d 204 (3 Cir. 1956) 9

United States v. Rabinowich, 238 U.S. 78 (1915) 10

Yick Wo v. Hopkins, 118 U.S. 356, 373-4 (1886) 12

United States Constitution:

Fifth Amendment 2

Sixth Amendment 2

Tenth Amendment 2

Statutes:

26 U.S.C. Sec. 4401 2

26 U.S.C. Sec. 4411 ..... 2, 9

26 U.S.C. Sec. 4412 ..... 2, 9

26 U.S.C. Sec. 6011(a) 9

28 U.S.C. Sec. 1254 (1) 2

26 C.R.F. Sec. 44.4412-1 (b) (2) 10

Connecticut General Statutes (1958 Rev.):

Sections 53-271 to 53-279 9

Sections 53-295 to 53-297 9

IN THE

Supreme Court of the United States

JANUARY TERM, 1966

No. .....

PELLEGRINO MILLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Pellegrino Millo, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 15, 1965.

OPINION BELOW.

The opinion of the Court of Appeals, as yet un-

reported, is printed in the Appendix to this petition (App. 1a)[1]

JURISDICTION.

The judgment of the Court of Appeals was entered on December 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Should **United States v. Kahriger,** 345 U. S. 22 (1953) and **Lewis v. United States,** 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax laws here involved be reconsidered by this Court in the light of recent decisions?

2. Assuming, **arguendo,** the continued validity of cases upholding the constitutionality of the wagering tax laws, were the statutes applied and enforced against petitioner in an unconstitutional manner or so as to violate the proper standards for the enforcement of federal criminal law under this Court's supervisory powers?

---

[1]References are indicated as follows:
References to the numbered pages of the Appendix to Petition for Petitioner, Pellegrino Millo (App. a)
References to the numbered pages of the Appendix to Brief for Appellant, Pellegrino Millo in the Court of Appeals (App. Ct. App. a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Petitioner maintains that the judgment of the court below, affirming his conviction for violations of the wagering tax laws, violates his rights under the Fifth, Sixth and Tenth Amendments of the United States Constitution. The wagering tax laws, 26 U.S.C. Secs. 4401, 4411 and 4412, and the constitutional provisions involved, together with general revenue laws relating to these cases, are set forth in the Appendix to this petition (App. 5a)

STATEMENT.

Petitioner faces a one-year prison sentence and a $10,000.00 fine for convictions by a jury presided over by Chief Judge Timbers of the United States District Court for the District of Connecticut upon an indictment charging willful violations of the wagering tax statutes (App. 1a). His conviction stems from a raid on October 8, 1964, in Bridgeport, Connecticut, in which he and 36 other defendants were arrested on similar charges (App. 1a).

The indictment against Petitioner and the others was returned under seal by a grand jury of the District of Connecticut on October 6, 1964, two days before the raid and arrests (App. Ct. App. 1a);

On January 9, 1965, in accordance with Chief Judge Timbers' order conditioning bail upon the filing of a notice of appeal within 24 hours, petitioner appealed to the Court of Appeals for the Second

Circuit (App. Ct. App. 4a), which affirmed the judgments (App. 5a).

Relying on **United States v. Kahriger,** 345 U.S. 22 (1953), and **Lewis v. United States,** 348 U.S. 419 (1955), the Court of Appeals rejected petitioner's constitutional attack upon the wagering tax statutes and the manner of their application here.

"Likewise, we hold that the statute, amended after **United States v. Kahriger,** 345 U.S. 22 (1953), was not beclouded thereby," **U. S. v. Costello, et al.,** 2 Cir. October 29, 1965, slip sheets 3319 at 3322-3323 and fn. 1 (App. 4a)

"Lastly, we also held in **U. S. v. Costello,** supra, at slip sheets 3324-3325, that as the payment of the tax and disclosure of the occupation is only required of one who of his own volition intends to follow the occupation, the requirements of the statutes do not violate the protection afforded by the Fifth Amendment because one is not compelled to incriminate himself. In so holding we relied upon **Lewis v. United States,** 348 U.S. 419 (1955). If by any chance **Albertson v. Subversive Activities Control Board,** ....U.S....., 34 U.S.L. Week 4014, November 15, 1965, decided after the present case was briefed and argued and after our decision in **U. S. v. Costello, supra,** was handed down, has affected **Lewis,** we continue to be bound by the **Lewis** holding. See **United States v. Grassia,** 2 Cir. November 26, 1965." (App. 4a)

In the cases of **James Marchetti v. United States of America,** Docket No. 29524, and **Frank Costello**

v. United States of America, Docket No. 29525, which were heard by the Circuit Court of Appeals, Second Circuit, and in which the Judgment of the District Court which was decided on October 29, 1965, the Court of Appeals stated:

> "We find no subsequent opinion (to **Kahriger** and **Lewis**) reflecting on the authority or reasoning of these cases and, at least under such circumstances, it is no proper function of ours to speculate on whether the dissent of yesterday may become the decision of tomorrow."

On reargument, the Court noted by reference to the related case of **United States v. Grassia:**

> "Recognizing that the rationale of **Albertson v. Subversive Activities Control Board** .... U.S. .... (1965), announced subsequent to our **Costello** opinion, may lead the Supreme Court to overrule its previous decisions in **United States v. Kahriger,** 345 U.S. 22 (1953), and **Lewis v. United States,** 348 U.S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination."

REASONS FOR GRANTING THE WRIT.

This petition presents significant and fundamental issues relating to the wagering tax statutes and their application in the District of Connecticut. Review of the questions presented is called for (1) because this Court's decisions in **United States v. Kahriger,**

345 U.S. 22 (1953), and **Lewis v. United States,** 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax statutes, are in conflict with later decisions of this Court; and (2) because the Court below has sanctioned statements by the district judge which sufficiently depart from the proper administration of federal criminal justice to call for an exercise of this Court's power of supervision.

I.

> "Are you engaged in the business of accepting wagers on your own account?"
>
> "Do you receive wagers for or on behalf of some other person or persons?" (App. 9a)

It is for his failure to answer these and more detailed inquiries contained in Internal Revenue Form 11-C (App. 9a) that petitioner has been subjected to a one year prison sentence and a $10,000.00 fine (App. 3a). As Mr. Justice Black commented in a dissent a decade ago, if a compelled response to these questions

> ". . . would not violate the Fifth Amendment privilege against self-incrimination, it is hard to think of anything that would." **Lewis v. United States, supra,** 348 U.S. at 425.

In rejecting petitioner's contention that the self-incrimination clause of the Fifth Amendment protected petitioner, in the wagering tax context, from having to make any statements save those that "cannot possibly have such tendency to incriminate,"

Malloy v. Hogan, 378 U.S. 1, 12 (1964), the court below relied squarely upon **Kahriger** and **Lewis.** In the cases of **United States of America v. Frank Costello, James "Totto" Marchettti and Arthur, Gjanci,** Docket No. 29524; **United States of America v. Frank Costello,** Docket No. 29525; **United States of America v. James "Totto" Marchetti,** Docket No. 29526; and **United States of America v. Arthur Gjanci,** Docket No. 29527, while noting, by reference, in its opinion on rehearing that **Albertson v. Subversive Activities Control Board, supra,** may lead this Court to overrule **Kahriger** and **Lewis** "insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination," the Court felt that the issue was appropriate only for this Court's determination.

What petitioner urges is a reappraisal of **Kahriger** and **Lewis** in the light of **Malloy** and **Albertson.**

Significantly, **Kahriger** and **Lewis** were decided without mention of the doctrine this Court firmly established in **Hoffman v. United States,** 341 U.S. 479, 486 (1951): that the privilege against self-incrimination "not only extends to answers that would in themselves support a conviction. . . ., but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute. . .," and without reference to the specific information sought by the Internal Revenue Service form involved here (App. 9a). **Malloy** reemphasized the link-in-the chain principle ignored in **Kahriger** and **Lewis; Albertson** emphasized the questions on the Justice Department registration form, the I. R. S. counter-

part of which is involved here and had been ignored in **Kahriger** and **Lewis.**

In **Kahriger** and **Lewis,** the wagering tax statutes were upheld because the Court felt they operated only prospectively and were, therefore, non-compulsory. 345 U.S. at 32, 33, 348 U.S. at 422. But by similar reasoning the **Albertson** registration provisions would have been held valid, since individual Communist Party members could terminate their membership within 30 days after entry of a Sec. 786(a) order directed to the Party, 34 U.S.L. Week at 4014, and thus avoid individual registration. Yet this Court invalidated the registration provisions in **Albertson;** and its comments in so doing are equally applicable to the wagering tax statutes and undermine the rationale of **Kahriger** and **Lewis:**

> "The risks of incrimination which the petitioners take in registering are obvious. Form IS-52a requires an admission of membership in the Communist Party. Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act. . . or under Section 4(a) of the Subversive Activities Control Act. . ., to mention only two Federal criminal statutes . . . **Patricia Blau v. United States,** 340 U.S. 159; **Irving Blau v. United States,** 340 U.S. 332; **Brunner v. United States,** 343 U.S. 918; (and) **Quinn v. United States,** 349 U.S. 195 . . . involved questions to witnesses on the witness stand, but if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes . . . It follows

that the requirement to accomplish registration by completing and filing Form IS-52a is inconsistent with the protection of the Self-Incrimination Clause." **Albertson v. S.A.C.B., supra,** 34 U.S.L. Week at 4016.

Here, too, the risks of incrimination are obvious. For petitioner to pay the tax required by 26 U.S.C. Sec. 4411 (App. 6a), thereby admitting that he was engaged in wagering, he would also be required, by 26 U.S.C. Secs. 4412 (App. 6a) and 6011 (App. 8a), to furnish on I.R.S Form 11-C the name and address "where each such business is conducted" and the "name and address" of each employee engaged in receiving wagers (App 8a).[2]

Disclosure in response to these questions, if not an outright admission of violations of some or all of Connecticut's anti-wagering laws, Sections 53-271 to 53-279, 53-295 to 53-297 (Conn. Gen. Stat., 1958

---

[2]These questions and the more detailed inquiries are contained on I.R.S. Form 11-C which is **both** a special tax return and application for registry, which petitioner would have had to complete in order to pay the special tax prescribed by Sec. 4411 and avoid conviction. By virtue of 26 U.S.C. Sec. 6011 (a):

> " . . . Every person required to make a return or statement shall include therein the information required by such forms or regulations."

The Commissioner of Internal Revenue refuses to accept receipt of the $50 for the stamp without the information required by Form 11-C. The fact that a defendant tenders payment which is refused is no defense to a subsequent prosecution for accepting wagers without payment of the $50 special tax. **United States v. Mungioli,** 233 F.2d 204, 205 (3 Cir. 1956).

Rev.)[3] would constitute at the very least a "link in a chain of evidence sufficient to connect" petitioner with such violations, 378 U.S. at 13.

Certainly the listing of employees and agents is tantamount to an admission that there has been an agreement with these persons to be employees or agents in the business of wagering.[4] And disclosure of the place of business in which wagering is carried on could lead authorities to a lease, purchase of real estate, or other rental agreement for the purpose of showing overt acts in furtherance of the wagering or conspiracy. **State v. McLaughlin,** 132 Conn. 325, 340, 44 A.2d 116, 123 (1945). The overt acts, of course, need not be successful toward accomplishing the object of the conspiracy, **State v. Devine,** 149 Conn. 640, 649, 183 A.2d 612, 616 (1962), and need not be criminal acts in themselves. **United States v. Rabinowich,** 238 U.S. 78, 86 (1915).

---

[3] In **Acklen v. State of Tennessee,** 267 S.W. 2d 101 (Tenn. 1954), for example, the defendant was convicted of conspiracy to violate a state gambling statute solely on the evidence that he had purchased a tax stamp.

[4] 26 C.F.R. Sec. 44.4412-1 (b) (2) requires a person engaging or about to engage in the business of receiving wagers to submit the name of any "employee" or "agent" hired to receive wagers **within 10 days after that** "employee" is so engaged. The "employer" then, is forced to supply the name of someone who will admittedly be in a unique position to bear witness against him. And due to the ten day delay permitted in the registration of such "employees" the information supplied would relate not only to future criminal acts, but also to **past** criminal acts.

If response to the questions asked in **Malloy**, 378 U.S. at 13-14, involved the **possibility** of self-incrimination, compelled compliance with the statutes here involved would make self-incrimination under Connecticut law a practical **certainty.**

To leave **Kahriger** and **Lewis** standing in view of the nature of the self-incriminatory responses called for by the statutory scheme involved in the wagering tax laws is to leave clouded with doubt the proud assertion that the Fifth Amendment privilege reflects our "most noble aspirations." **Murphy v. Waterfront Commission of New York,** 378 U.S. 52, 55 (1964).

II.

Not only do the wagering tax statutes here involved violate the Fifth Amendment, but the manner of their application violates the Tenth Amendment, and, at the very least, the proper standards for the enforcement of federal criminal law.

Since **Kahriger** — which rejected Mr. Justice Frankfurter's view that the revenue aspect of the wagering tax statutes constituted merely "verbal cellophane" allowing Congress to "control conduct which the Constitution left to the responsibility of the states," 345 U.S. at 38 — this Court has made it clear that no weight can be given to the premise that the enactment of the statutes was "in part motivated by a congressional desire to end wagering." **United States v. Calamaro,** 354 U.S. 351, 358 (1957). Consideration of such collateral motives, this Court added in **Calamaro,** "might place the constitutional-

ity of the statute in doubt." 354 U.S. at 358. Significantly, in affirming over Tenth Amendment objections, the court below ignored **Calamaro** (App. 1a-5a)

In **Kahriger,** the Court considered only the bare words and history of the statutes themselves. In the case at bar, the manner of application and enforcement of the statutes — both by the Government and the district court —[5] clearly demonstrates that the "constitutionality . . . doubt" feared in **Calamaro** has materialized.

The Appellant was convicted of violating a federal tax law and not a state gambling law. It is apparent, however, that the Court viewed the statute as a means of assault by the Federal Government upon gambling crimes covered by state law rather than as a revenue raising measure. On January 1, 1965 the following remark was made by the Court prior to imposition of sentence upon the Appellant.

> "'While it is true that these are tax cases, prosecution authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that **it is the clear intent of Congress, in authorizing such prosecu-**

---

[5]It is fundamental that the application and enforcement of a federal statute — constitutionally sound on its face — may result in a constitutional denial. **Yick Wo v. Hopkins,** 118 U.S. 356, 373-4 (1886); **Snowden v. Hughes,** 321 U.S. 1 (1944)

tions, to deal with a vice, namely that of gambling."[6]

These remarks of the trial court are not in accord with the opinion expressed by the United States Supreme Court.

> "The statute was passed and its constitutionality was upheld, as a revenue measure, and apart from all else in construing it we would not be justified in resorting to collateral motives or effects which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt."
>
> **U. S. v. Calamaro,**
> 354 U.S. 351, 358

The use of improper, misplaced and incorrect criteria as a basis for sentence was a clear violation of the Appellant's rights.

> **Townsend v. Burke,**
> 334 U.S. 736, 741

Even if the combined conduct of Government and court is not interpreted as a Tenth Amendment encroachment, a reversal is called for on the basis of this Court's exercise of its "supervisory power to formulate and apply proper standards for the en-

---

[6]Transcript of proceedings held on Jan. 11, 1965 in connection with imposition of sentence upon Frank Costello, Arthur Gjanci, James Marchetti, Carl Piccioli, and related cases. Circuit Court Docket Nos. 29524 and 29526 Defendant-Appellant's joint Appendix Pg. 344(a).

forcement of the criminal law." **Marshall v. United States,** 360 U.S. 310, 313 (1959).

On March 8, 1965, the Court imposed sentence against the Appellant and several other defendants, each of whom was convicted of violating federal gambling tax laws. Appellant submits that he was denied due process of law, in that improper and mistaken criteria were used by the Court as a basis for imposing sentence. (App. Ct. App. 18a) (See Remarks of Honorable William H. Timbers, February 8, 1965).

The Connecticut Chief Judge's public urgings to "eradicate this . . . cancer of organized gambling . . . now" (App. Ct. App. 20) and other statements expressed in his remarks, indicate, as Judge Learned Hand once wrote, that the:

> " . . judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials." **United States v. Marzano,** 149 F.2d 923, 926 (2 Cir. 1945).

That the statements were post-trial certainly does not eliminate the need for exercise of this Court's supervisory power. As the Supreme Court of Rhode Island said in a similar situation:

> "The import of these remarks . . . made immediately after the conclusion of the trial with a verdict of guilty discloses a prejudical state of mind on the part of the judge that reasonably must be considered to have existed during the

trial." **State v. Nunes**, 205 A.2d 24, 27 (R. I. 1964).

CONCLUSION.

For these reasons, then, this Court should — and petitioner requests that it does — issue its writ of certiorari to review the judgments of the court below.

Respectfully submitted,

EDWARD G. BURSTEIN
JEROME GOLDMAN
177 State Street
Bridgeport, Connecticut
Counsel for Petitioner.

January 7, 1966.

LIBRARY
SUPREME COURT, U. S.
JAN 13 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

JANUARY TERM, 1966

No. 5

PELLEGRINO MILLO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR PETITIONER PELLEGRINO MILLO.

EDWARD G. BURSTEIN
JEROME GOLDMAN
177 State Street
Bridgeport, Connecticut
Counsel for Petitioner

INDEX TO APPENDIX.

	PAGE
nion of Court of Appeals	1a
tutes, Constitutional Provisions and Regulations nvolved	5a
cerpt from Internal Revenue Form 11-C	9a

OPINION OF COURT OF APPEALS

United States Court of Appeals
For The Second Circuit

No. 96 — September Term, 1965

(Argued October 8, 1965
Decided December 15, 1965)

Docket No. 29743

UNITED STATES OF AMERICA,
Appellee,

vs.

PELLEGRINO MILLO,
Appellant.

Before:

Lumbard, Chief Judge
Waterman and Hays, Circuit Judges

Appellant seeks reversal of his conviction after a jury trial in the United States District Court for the District of Connecticut, Timbers, Chief Judge, for having wilfully failed to pay the occupational tax relating to wagers imposed by 26 U.S.C. Sec. 4411 and having wilfully failed to register under 26 U.S.C.

Sec. 4412, in violation of 26 U.S.C. Sec. 7203. Affirmed.

JON O. NEWMAN, United States Attorney for the District of Connecticut, Hartford, Conn., for Appellee.

EDWARD G. BURSTEIN, JEROME GOLDMAN, Bridgeport, Connecticut, for Appellant.

WATERMAN, Circuit Judge:

This appeal is one of several that have arisen out of raids conducted on October 8, 1964 in Bridgeport, Connecticut, upon alleged gambling establishments in that city.

Appellant was arrested in a raid at his restaurant that day. He was found guilty after a jury trial in the United States District Court for the District of Connecicut of having wilfully failed to pay the special gambling occupational tax required by 26 U.S.C. Sec. 4411 and of having wilfully failed to register as required by 26 U.S.C. Sec. 4412, both omissions being in violation of 26 U.S.C. Sec. 7203.

The issues presented upon appeal, all of which were properly preserved below, are: Whether these wagering tax statutes violate one's privilege against self-incrimination guaranteed by the Fifth Amendment; whether the statutes are void for vagueness in that they create a circular scheme of such a nature that one cannot anticipate one's liability to either pay a tax or to register; whether the sentence

of one year's imprisonment and a committed fine of ten thousand dollars on the count charging failure to pay the occupational tax was imposed because the sentencing judge viewed this statute as one directed toward the punishment of gamblers rather than directed toward the raising of revenue; and, lastly, whether there was sufficient evidence introduced at trial by the Government to prove either the defendant's wilfullness or that he was engaged in the business of accepting wagers.

We take up these issues in reverse order. There was sufficient evidence from which the jury could determine that appellant was in the business of accepting wagers and that he wilfully failed to purchase the wagering tax stamp. A special agent of the Internal Revenue Service had placed wagers with appellant on three separate occasions in August, September and October 1964; when the restaurant was raided tally sheets and numbers slips in appellant's handwriting were seized by the raiding officers; and while the raid was being conducted there were telephone calls that the agents answered from persons desiring to place series of bets and who asked for appellant by his nickname. And, too, defendant assured the arresting officers, while stoutly maintaining that he took no bets, that he well knew the wagering tax stamp requirement required of those who were engaged in the wagering business.

The sentence imposed was the maximum provided by Congress in 26 U.S.C. Sec. 7203, so it was proper to impose it; but appellant speculates that remarks made by the sentencing judge on January 11, 1965, two weeks before appellant's trial began, and re-

marks made by him on February 8, 1965, two months and one month, respectively, before appellant was sentenced, not only affected the severity of the sentence but somehow infected the entire case with a federal overreaching in violation of the Fifth and Tenth Amendments into state police prerogatives. Of course, these remarks were not made when appellant was sentenced but we have discussed their impact upon the overall situation in our opinion affirming the conviction of one who was sentenced on January 11, 1965, see **U. S. v. Piccioli,** 2 Cir. October 29, 1965, slip sheets 3335 at 3340-3342.

Likewise we hold that the statute, amended after **United States v. Kahriger,** 345 U.S. 22 (1953), was not beclouded thereby, **U. S. v. Costello, et al,** 2 Cir. October 29, 1965, slip sheets 3319 at 3322-3323 and fn. 1.

We find no merit in either of these two attacks upon the judgment of conviction and the sentence imposed below.

Lastly, we also held in **U. S. v. Costello, supra,** at slip sheets 3324-3325, that as the payment of the tax and disclosure of the occupation is only required of one who of his own volition intends to follow the occupation, the requirements of the statutes do not violate the protection afforded by the Fifth Amendment because one is not compelled to incriminate himself. In so holding we relied upon **Lewis v. United States,** 348 U.S. 419 (1955). If by any chance **Albertson v. Subversive Activities Control Board** —U.S.— 34 U.S.L. Week 4014, November 15, 1965, decided after the present case was briefed and argued and

after our decision in **U. S. v. Costello, supra,** was handed down, has affected **Lewis,** we continue to be bound by the **Lewis** holding. See **United States v. Grassia,** 2 Cir. November 26, 1965.

Affirmed.

STATUTES, CONSTITUTIONAL PROVISIONS, AND REGULATIONS INVOLVED.

68A Stat. 525 (1954), 26 U.S.C. Sec. 4401 (1958):

Imposition of tax.

(a) Wagers — There shall be imposed on wagers, as defined in Section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of Wager — In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax — Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed

in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

68A Stat. 527 (1954), 26 U.S.C. Sec. 4411 (1958):
Imposition of tax

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

68A Stat. 527 (1954), 26 U.S.C. Sec. 4412 (1958):
Registration

(a) Requirement. — Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district —

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax

under subchapter A, the name and place of residence of each such person.

(b) Firm or company — Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information — In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

68A Stat. 851 (1954), 26 U.S.C. Sec. 7203 (1958): **Willful failure to file return, supply information or pay tax**

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviciton thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

68A Stat. 732 (1954), 26 U.S.C. Sec. 6011 (1958): **General requirement of return, statement, or list**

(a) General rule — When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

26 C. F. R. Sec. 44.4412-1 (B) (2): **Registration**

"(2) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked "Supplemental," each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see Sec. 44.4905-2.

EXCERPT FROM INTERNAL REVENUE FORM 11-C

. . . "Are you engaged in the business of accepting wagers on your own account?" . . .

. . . "Do you receive wagers for or on behalf of some other person or persons?" . . .

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 902

PELLEGRINO MILLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted on a two-count indictment charging him with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by § 4412; he was sentenced to imprisonment for one year and fined $10,000. His case is one of a number arising out of a coordinated campaign against violators of the Wagering Tax Statute in the Bridgeport, Connecticut area. Other cases arising from the same campaign are before this

Court on petitions filed by James Marchetti (No. 823), Frank Costello (No. 826), Arthur Gjanci (No. 1028 Misc.), Stanley Markis (No. 848), Alfred Grassia (No. 906), Carl Piccioli (No. 849), and Albert P. Moretti (No. 951). This petition claims that the statute offends the Fifth Amendment and that its specific enforcement violates the Tenth Amendment. Both questions have been raised by all petitioners, and have been treated in our combined brief in answer to the petitions filed by Marchetti, Costello and Gjanci.* See also *United States* v. *Angelini*, 346 F. 2d 278 (C.A. 7), certiorari denied, 382 U.S. 838. For the reasons stated in that brief, it is respectfully submitted that this petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

---

* Copy of that brief is being served upon petitioner.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 206802 567

FILED
JAN 13 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 6

ALFRED GRASSIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID GOLDSTEIN
JACOB D. ZELDES
955 Main Street
Bridgeport, Connecticut

Counsel for Petitioner

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	3
Reasons for Granting the Writ	8
Conclusion	17

TABLE OF AUTHORITIES CITED

CASES:

Albertson v. Subversive Activities Control Board, —— U. S. —— (1965)	7, 9
Blair v. United States, 250 U. S. 273 (1919)	15
Janko v. United States, 366 U. S. 716 (1961)	16
Lewis v. United States, 348 U. S. 419 (1955)	2, 8, 9, 10
Malloy v. Hogan, 378 U. S. 1 (1964)	9
Marshall v. United States, 360 U. S. 310 (1959)	11, 16
Maryland v. Baltimore Radio Show, 338 U. S. 912 (1950)	17

PAGE

Murphy v. Waterfront Commission of New York, 378 U. S. 52 (1964) 10

Rideau v. Louisiana, 373 U. S. 723 (1963) 11, 12, 14

United States v. Kahriger, 345 U. S. 22 (1953) 2, 8, 9, 10
United States v. Piccioli, —— F. 2d —— (1965) 15

UNITED STATES CONSTITUTION:

Fifth Amendment 3, 6, 9, 10

Sixth Amendment 3, 13, 16, 17

Tenth Amendment 3, 6, 10, 11

STATUTES:

26 U. S. C. §4401 3

26 U. S. C. §4411 ..... 3, 4

26 U. S. C. §4412 ..... 3, 4

26 U. S. C. §7203 ..... 3, 4

RULES:

Rule 6(e), F. R. Cr. P. 12

Rule 23(5), Rules of Supreme Court 10

MISCELLANEOUS:

A CONCISE COMPENDIUM OF THE WARREN COMMISSION REPORT 319-321 (Pop. Lib. Ed. 1964) 13

Hiss, IN THE COURT OF PUBLIC OPINION 295 (1957) .. 15

PAGE

Manes, *Irvin* v. *Dowd: Retreat From Reality*, 22 LAW IN TRANSITION 46 (1962) 16

Mathes, *Jury Instructions and Forms for Federal Criminal Cases*, 27 F. R. D. 39, 184 (1961) 15

McCullough, *The Sunset of the Criminal Lawyer*, 50 A. B. A. J. 223 (1964) 13

APPENDIX:

Opinion of the Court of Appeals 1b

Statutes, Constitutional Provisions and Regulations Involved 6b

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

ALFRED GRASSIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Alfred Grassia prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 26, 1965.

Opinion Below

The opinion of the Court of Appeals, as yet unreported, is printed in the appendix to this petition (1b).[1] The opin-

[1] References are indicated as follows:
References to the numbered pages of the appendix filed by petitioner in the Court of Appeals together with the proceedings in that court (a).
References to the numbered pages of the appendix to this petition (b).
References to the numbered pages of the record certified by the clerk of the District Court on June 4, 1965 and now on file in this Court (R.). (*footnote continued*)

ions in *U. S. A.* v. *Costello, Marchetti* and *Gjanci,* and *U. S. A.* v. *Piccioli,* related cases, are printed in the appendix filed in *Marchetti* v. *U. S. A.,* No. 823 on the docket of this Court (#823 App. 1-23a).

Jurisdiction

The judgment of the Court of Appeals was entered on November 26, 1965. Petitioner's timely petition for rehearing *en banc* was denied on December 17, 1965 (100a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

Petitioner's conviction stems from the same raid referred to in *Marchetti* v. *U. S. A.,* No. 823 on the docket of this Court, and raises the following questions also presented in that petition:

1. Should *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955). upholding the constitutionality of the wagering tax laws here involved, be reconsidered by this Court in the light of recent decisions?

References to the numbered pages of the supplemental record certified by the clerk of the District Court on July 21, 1965 and now on file in this Court (SR.).

References to the numbered pages of the appendix filed in *Marchetti* v. *U. S. A.,* No. 823 on the docket of this Court (#823 App. a).

References to the numbered pages of the petition filed in *Marchetti* v. *U. S. A.,* No. 823 on the docket of this Court (#823 Pet.).

2. Assuming, *arguendo,* the continued validity of cases upholding the constitutionality of the wagering tax laws, were the statutes applied and enforced against petitioner in an unconstitutional manner or so as to violate the proper standards for the enforcement of federal criminal law under this Court's supervisory powers?

Constitutional and Statutory Provisions Involved

Petitioner maintains that the judgment of the court below, affirming his convictions for violations of the wagering tax laws and the federal conspiracy statute, violates his rights under the Fifth, Sixth and Tenth Amendments of the United States Constitution. The wagering tax laws, 26 U. S. C. §§4401, 4411 and 4412, and the constitutional provisions involved, together with general revenue laws relating to these cases, are set forth in the appendix to this petition (6b).

Statement

Petitioner faces a four month prison sentence and a $2,500 fine (72a) for a conviction upon a charge of wilfully failing to pay, in violation of 26 U. S. C. §7203, the special wagering tax imposed by 26 U. S. C. §4411 (1a, 8a-9a, 49a; 2b). The judgment was entered following petitioner's plea of *nolo contendere* to count one of a two-count indictment returned under seal by a grand jury of the District of Connecticut on October 6, 1964 (1a, 6a, 8a, 76a-78a).

Petitioner's conviction stems from a raid on October 8, 1964, in Bridgeport, Connecticut, which also resulted in convictions of others who now seek review in this Court (#823 App. 1-23a).

By motions to dismiss the indictment—all of which were denied by the trial court (5a, 6a, 11a-14a, 45a, 49a)—petitioner challenged the constitutionality of the statutes involved, on their face and as applied to him, and raised all issues presented by this petition. After notifying the District Court and the Government of his intention to appeal the issues raised in the motions to dismiss, petitioner submitted and the court accepted his plea of *nolo contendere* on February 16, 1965 (6a, 79a; 3b).

In addition to the indictment returned against petitioner, the grand jury on October 6, 1964 also returned 37 other indictments which alleged violations of 26 U. S. C. §§7203, 4411 and 4412 (19a). On October 8, 1964, all of the defendants indicted by the grand jury, as well as approximately six other defendants against whom similar charges were filed, were simultaneously arrested in what a Government press release termed a "spectacular thrust at the exyensive (sic) gambling activities in" the Bridgeport, Connecticut area, in which "75 special agents of the Intelligence Division, with the aid of 50 State Policemen, swooped down on some 40 establishments" (18a).

As noted, when the indictments were returned on October 6, 1964, they were at the Government's request impounded by the court (1a, 21a, 76a-78a). The court specially warned:

> ". . . there must be no disclosure by anyone as to the identity of those named in the indictment, or even of the fact that such proceedings have taken place by you ladies and gentlemen" (78a).

Prior to the time the impounding order was vacated at 2:36 p.m., October 8, 1964 (21a, 22a), the Government sum-

moned members of the press to a private law office in Bridgeport (23a-24a) and later took them to the Internal Revenue Service headquarters, enabling them to photograph those arrested, including petitioner (36a), as they were brought into custody (24a). *The Bridgeport Post* newspaper of October 8, 1964 printed banner headlines (30a) and an extensive article proclaiming the arrests before some defendants were actually arrested (22a, 30a, R. 40-41) and newspapers and radio and television broadcasts were saturated with details of the raids and individuals involved (22a-23a; #823 App. 7a-8a).

At or before the time the representatives of the press were brought to the Internal Revenue Service office (24a, R. 12), the Government handed out a prepared statement marked "FOR IMMEDIATE RELEASE"; "U. S. TREASURY AGENTS STAGE MASSIVE RAIDS" (24a; R. 55-57).

In addition to the prepared release, additional oral statements were made, including these:

"We have definitely broken the back of gambling in the city" (25a, 38a, R. 13, 40, 42).

"The raids were part of the national crackdown on organized crime initiated by the Office of the U. S. Attorney General" (18a, 22a, R. 13).

"The incidence of violation of wagering laws was extensive and prevailed throughout a great part of the City" (25a, R. 13).

"Based on the amount of money found, the Bridgeport gambling operation involved gross receipts of more than $1 million a year" (28a).

"Funds from the gambling operation in Bridgeport were supporting prostitution and shylocking" (26a, 34a, R. 40, 46).

"Gambling is wide open in Bridgeport. There's no hiding the fact. It has been pretty wide open in Bridgeport for a long time" (26a, 34a, R. 49, 46).

"Some of the women even cried as they told me how gambling by their husbands had caused them continuous hardship" (27a, 42a, R. 44).

In the wake of the Government's conscious generation of publicity, petitioner sought dismissal of the indictment in his first motion on the grounds that (1) the Government's conduct barred the prosecution by virtue of, *inter alia*, the Tenth Amendment and the federal court's supervisory power over criminal prosecutions and (2) the wagering tax statutory scheme compelled petitioner to be a witness against himself in violation of the Fifth Amendment privilege against self-incrimination (11a-14a, R. 14). Chief District Judge Timbers refused to permit petitioner to present any evidence relating to the conscious generation of publicity (45a, R. 60, SR. 13-73) and denied the motion on all grounds (45a, R. 60).

On January 11, 1965, while petitioner was awaiting trial (5b) Chief District Judge Timbers imposed sentence on the first group of defendants who were arrested in the raid of October 8, 1964, at the time petitioner was arrested. In describing the revenue laws here involved and in announcing his policy for enforcement, Judge Timbers said:

". . . it is the clear intent of Congress in authorizing such prosecutions, to deal with a vice, namely that of gambling.

"The Court does not intend, in imposing sentence here, to deal out the slap on the wrist which has characterized sentences imposed by the State Courts for violations of the State gambling laws . . ." (54a, R. 94-95; #823 App. 345a).

Again, on February 8, 1965, prior to sentencing a second group of defendants arrested on October 8, 1964, Chief Judge Timbers made similar comments (58a-69a) at a session of court to which newsmen had been invited to attend (R. 104). He first criticized the "wrist slapping penalties" imposed by the state courts and then the "ostrich-in-the-sand" attitude of some State officials. Following detailed suggestions on "how to eradicate this disease" (61a), Chief Judge Timbers concluded with this comment:

"In conclusion, the important thing, if we are successfully to come to grips with the cancer of organized gambling in this state, is action: intelligent action, courageous action, swift action, and action now." (67a).

On the basis of these public pronouncements, as well as the earlier widespread publicity by the Government, petitioner moved again to dismiss the indictment. This motion was also denied (80a).

Following the denial of the final motion to dismiss and petitioner's conviction upon his plea of *nolo contendere*, petitioner appealed to the Court of Appeals, which affirmed (1b).

The court below recognized that *Albertson* v. *Subversive Activities Control Board*, —— U.S. —— (1965), may lead to the invalidation of the wagering tax statutes here in-

volved on self-incrimination grounds, but felt that that issue must be determined only by this Court (3b).

In regard to the claim of undue publicity, the court below clearly recognized the impropriety of "publicity generated by the prosecutor and the judge" (5b; #823 App. 8a, 21a), but felt that petitioner's remedy for the wrongs recognized was in "examining the venire . . . on a voir dire." (5b). The court approached the issue of publicity consciously generated by the prosecutor and the district court in terms of demonstrable prejudice (5b) and made only slight reference to its power to supervise the administration of federal criminal law (4b).

Because petitioner felt the affirmation of his conviction sanctioned an administration of justice predicated in large measure on public pronouncement, he sought rehearing *en banc* (88a). The court below denied rehearing on December 17, 1965 (100a), but stayed the issuance of its mandate to permit the filing of this petition (96a).

Reasons for Granting the Writ

This petition presents significant and fundamental issues relating to the wagering tax statutes and their application in the District of Connecticut. Review of the questions presented is called for (1) because this Court's decisions in *United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax statutes, are in conflict with later decisions of this Court; (2) because the court below has sanctioned the conscious generation of publicity by the Government and statements by the district judge which

sufficiently depart from the proper administration of federal criminal justice to call for an exercise of this Court's power of supervision.

I.

> "Recognizing that the rationale of *Albertson* v. *Subversive Activities Control Board,* —— U.S. —— (1965), announced subsequent to our Costello opinion, may lead the Supreme Court to overrule its previous decisions in *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination." (3b).

With this comment, the Court of Appeals rejected petitioner's Fifth Amendment contentions. What petitioner urges here is that this Court (1) accept for determination the issue which the Court of Appeals felt was ripe only for this Court's review and (2) recognize that recent decisions of this Court are in patent conflict with *Kahriger* and *Lewis.*

Petitioner's conviction stems from his failure to answer the following and more detailed inquiries contained in Internal Revenue Form 11-C:

> "Are you engaged in the business of accepting wagers on your own account?"
>
> "Do you receive wagers for or on behalf of some other person or persons?" (70a).

The manner in which *Albertson* and *Malloy* v. *Hogan,* 378 U.S. 1, 11 (1964), demonstrate that response to these

questions pursuant to the statutory scheme here involved violates the Fifth Amendment privilege against self-incrimination is set forth in the petition filed in this Court in *Marchetti* v. *U. S. A.* (#823 Pet. 9-13). So that the Court need not be burdened with the repetition of similar material, reference is made to the Marchetti petition in accordance with the rules of this Court. Rule 23(5), Rules of Supreme Court.

To leave *Kahriger* and *Lewis* standing in view of the nature of the self-incriminatory responses called for by the statutory scheme involved in the wagering tax laws is to leave clouded with doubt the proud assertion that the Fifth Amendment privilege reflects our "most noble aspirations." *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 55 (1964).

II.

Not only do the wagering tax statutes here involved violate the Fifth Amendment, but the manner of their application violates the Tenth Amendment and, at the very least, the proper standards for the enforcement of federal criminal law.

The Government's sensational comments—such as "we have definitely broken the back of gambling in the City" (25a) and the Chief District Judge's candid reference to the "latest federal crackdown upon gambling and organized crime" (60a)—clearly indicate that the statutes here involved, narrowly upheld in *Kahriger*, have been enforced both prosecutorally and judicially so as to control conduct which the Tenth Amendment left to the states (#823 Pet. 14-15).

Even if the combined conduct of Government and court is not interpreted as a Tenth Amendment encroachment, a reversal is called for on the basis of this Court's exercise of its "supervisory power to formulate and apply proper standards for the enforcement of the criminal law." *Marshall* v. *United States,* 360 U.S. 310, 313 (1959).

In reviewing petitioner's and others' cases, the court below has recognized the impropriety of the public pronouncements of the Government and the Chief District Judge (#823 App. 8a, 20a-23a; 5b). But the court analyzed petitioner's contentions as requiring a showing of demonstrated prejudice (5b) and concluded that petitioner's remedy was "by adhering to his plea of not guilty and examining the venire . . . on a voir dire." (5b).

Review of this approach of the court below is called for because the Court of Appeals has adopted a view (1) which is counter to this Court's position in *Rideau* v. *Louisiana,* 373 U. S. 723 (1963), (2) which will do disservice to the administration of criminal justice and (3) which ignores the subliminal impact of publicity established as a matter of fact in this case and now recognized by this Court.

1. In *Rideau,* this Court abandoned the need for a showing of actual prejudice and discarded the significance of the *voir dire* examination:

> "The record shows that such a thing as this never took place before in Calcasieu Parish, Louisiana. Whether it has occurred elsewhere, we do not know. But we do not hesitate to hold, *without pausing to examine a particularized transcript of the voir dire examination of the members of the jury,* that due process of law in this case required a trial before a

> jury drawn from a *community* of people who had not seen and heard Rideau's televised 'interview.'" 373 U. S. at 727. (Emphasis added.)

The *Rideau* dissent adds significance. Mr. Justice Clark, noting an abhorrence for officials who "actively . . . cooperate" in generating publicity, stated:

> " . . . if this case arose in a federal court over which we exercise supervisory powers, I would vote to reverse the judgment before us." 373 U. S. at 729.

Here both Government and trial court "actively . . . cooperate[d]" in generating the publicity (5b).

As concerns the Government's conduct, it is significant that the massive banner headlines (30a) were made possible not only by issuing the prepared press release (18a) and summoning newsmen in advance to a private law office (23a-24a) but by manipulating the court's secrecy order in violation of Rule 6(e), F. R. Cr. P. All information necessary to write the story was released to the newspaper involved by 2:10 p.m. October 8, 1964 (21a) whereas the order unsealing the indictment was filed at 2:36 p.m. October 8, 1964 (21a, 10a) and well before all of the defendants involved in the raids had actually been arrested (22a, R. 85-87). While Rule 6(e) permits sealing the indictment to apprehend defendants, it hardly justifies using the device for public relations purposes.

The Government's justification for the procedure it followed on the ground that it simply "insures that matters that may properly be reported are reported promptly and accurately" (#823 App. 89a) seems to confuse a free press

with a managed press. Certainly, the Government's position has been rejected:

> " . . . neither the press nor the public had a right to be contemporaneously informed by the police or prosecution authorities of the details of the evidence being accumulated against Oswald." A CONCISE COMPENDIUM OF THE WARREN COMMISSION REPORT 319-321 (Pop. Lib. Ed. 1964).

As concerns the trial court's conduct, it is significant that Chief District Judge Timbers "invited press representatives" (R. 104) to the court session of February 8, 1965 where he read a prepared statement (58a-69a)[2] in which he noted "the ground swell of public support throughout the state for what has been accomplished by this latest federal crackdown upon gambling and organized crime" (#823 App. 22a), outlined a detailed program for his proposed Connecticut Conference on Law Enforcement (#823 App. 22a; 64a-67a) and then asked for comments from the public in the court room (68a).

In view of this active generation of publicity by court and Government, the Court of Appeals' present insistence on a *voir dire,* then, does clear violence to *Rideau,* which involved but the minimal standards of due process, not the higher standards adopted under federal supervisory power.

---

[2] The comments were widely reported (54a, 56a, R. 94-124) and, of course, had wide impact in the community. In praising the District Court's pronouncements, one clergyman openly criticized attorneys who, while holding public office, defend those like petitioner accused of violating the revenue laws (R. 101). Such community pressure, prompted by the court's comments, does great disservice to the Sixth Amendment right to counsel at a time when bar and bench alike lament the fact that fewer lawyers are willing to accept criminal cases. McCullough, *The Sunset of the Criminal Lawyer,* 50 A. B. A. J. 223 (1964).

2. The lower court's suggested *voir dire* remedy (5b) —besides being incompatible with *Rideau*—would do great disservice to the administration of criminal justice in Connecticut, particularly in view of the Connecticut Chief Judge's "ill-advised" (5b) comments. At such a *voir dire*, the following type of questions would be appropriate:

> "If the Court should instruct you, contrary to statements you have read or heard made by the Chief Judge of the Federal Court in this State, would you disregard the statements of the Chief Judge and follow the instructions the Court should give?"
>
> "If two witnesses tend to give varying testimony and one of the witnesses has been publicly praised by the Chief Judge of this Court, would you treat the witnesses' testimony the same in weighing their credibility or would you consider the public praise or criticism of the Chief Judge in weighing the credibility of the witnesses?"

The first type of question would be necessary because of, *inter alia,* Chief Judge Timbers' statements that "it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely, that of gambling" (#823 App. 22a) and that gambling is a "cancerous disease" which "together with narcotics and prostitution . . . is one of the ugly handmaidens of vice and corruption" (60a), whereas at trial the charge that would have to be given by the trial judge would be:

> "Defendant is not on trial for bookmaking or gambling, which may be an offense under the laws of the State of Connecticut. So you will not consider any evidence as to bookmaking or gambling for any pur-

pose other than determining defendant's liability, if any, for the taxes alleged in the indictment." Mathes, *Jury Instructions and Forms for Federal Criminal Cases,* 27 F. R. D. 39, 184 (1961).

The second type of inquiry would be required because of Chief Judge Timbers' widely circulated praise of the Internal Revenue agents and members of the prosecution (59a), while criticizing individual police officers for appearing as witnesses in behalf of those accused of violating the revenue laws involved here (R. 98, 99).[3]

This type of *voir dire* examination, then—necessary to make any inquiry meaningful in the wake of the Chief Judge's "statements in the prosecutorial area beyond his function," *United States* v. *Piccioli,* —— F. 2d —— (1965) (#823 App. 23a)—would obviously do disservice to the administration of justice over which this Court has supervisory responsibility.

3. Finally, the Court of Appeals' compelling of reliance on a *voir dire* examination ignores the subliminal impact of publicity. Among the matters established—by offer of proof since petitioner's repeated offers of "testimonial, documentary and electronic audio visual evidence" (21a) were rejected (SR. 13-73; #823 App. 33a-75a)[4]—was the

[3] Certainly, if it was proper for justices of the United States Supreme Court to testify on behalf of one accused of perjury relating to national security, Hiss, IN THE COURT OF PUBLIC OPINION 295 (1957), it cannot be considered improper for police officers to give relevant information in open court in any criminal prosecution. Moreover, " . . . it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned. . . . " *Blair* v. *United States,* 250 U. S. 273, 281-82 (1919).

facts, based on a qualified expert's valuation of the publicity that a "juror, although in good faith attempting to do so, could not disregard the publicity . . . [and] a juror . . . who had forgotten about [the publicity] . . . would nevertheless be influenced . . . because of the subliminal stimulation of his mind by that publicity." (29a).

What petitioner's record established in this fashion is consistent with this Court's recognition, in such cases as *Marshall* v. *United States, supra,* and *Janko* v. *United States,* 366 U. S. 716 (1961), *sum. rev'g* 281 F. 2d 156 (8 Cir. 1960), of the "subliminal impact on federal juries of even a single newspaper item." Manes, *Irwin* v. *Dowd: Retreat from Reality,* 22 LAW IN TRANSITION 46, 58 (1962).

To be sure, what petitioner seeks here is a dismissal of the indictment, not a new trial, the customary remedy for existence of improper publicity. But to limit petitioner's relief to a continuance or a change of venue after the court has recognized the impropriety of the publicity generated by the Government and the trial court would be to sanction the Government and trial court causing an abandonment of the Sixth Amendment right to go to trial in the "district where the crime shall have been committed" or the Sixth Amendment right to a "speedy trial." Certainly, there can be no sound reason to allow the Government and trial court to force a defendant to abandon other, equally-important rights, just so the Government and court can practice what now has been condemned.

---

[4] The transcript of the November 17, 1964 hearing on the first motion to dismiss when this evidence was offered is contained in the certified supplemental record on file in this Court. It is also printed in the appendix to the Marchetti petition.

It follows that—where the publicity is solely the product of an overzealous free press[5] and where the subliminal impact has not been established—the required demonstration of actual prejudice on a *voir dire may* be appropriate. But where Government and court combine to generate publicity for reasons unrelated to the federal public interest or the subliminal impact of the publicity on the jury can be ascertained with reasonable probability, the demonstration of actual prejudice on a *voir dire* examination is unnecessary and the indictment should be dismissed to prevent forfeiture of other, equally-important Sixth Amendment rights.

Conclusion

For these reasons, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgments of the court below.

Respectfully submitted,

DAVID GOLDSTEIN
JACOB D. ZELDES
955 Main Street
Bridgeport, Connecticut

Counsel for Petitioner

January 12, 1965.

---

[5] To be sure, the responsibility for freedom of the press and the safeguards of the fair administration of justice—both indispensable elements of our constitutional existence—"present," as Mr. Justice Frankfurter noted, "some of the most difficult and delicate problems for adjudication." *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 919 (1950). Because of the active Government role here, however, this Court need not concern itself with such a delicate problem.

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—September Term, 1965.

(Argued October 28, 1965 Decided November 26, 1965.)

Docket No. 29791

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFRED GRASSIA,

Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Defendant, having been charged in a two-count indictment, in the District Court for Connecticut, with willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411, in violation of 26 U. S. C. §7203, changed his plea of not guilty to one of *nolo contendere* on one count, and appeals from the resulting conviction by Judge Clarie. Affirmed.

JACOB D. ZELDES (David Goldstein, Bridgeport, Conn., on brief), *for Appellant.*

JON O. NEWMAN, United States Attorney for the District of Connecticut, *for Appellee.*

FRIENDLY, *Circuit Judge*:

This is another appeal stemming from the raids relating to enforcement of the federal wagering tax at Bridgeport, Connecticut, on October 8, 1964. See *United States* v. *Costello*, —— F. 2d —— (2 Cir. 1965), *United States* v. *Piccioli*, —— F. 2d —— (2 Cir. 1965), and *United States* v. *Markis*, —— F. 2d —— (2 Cir. 1965). Alfred Grassia, represented by counsel and duly questioned by Judge Clarie at a term of the District Court for Connecticut at Hartford, to which, at his request, his case had been transferred for trial on his not guilty plea, pleaded *nolo contendere* to one count of a two-count indictment charging, under 26 U. S. C. §7203, willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411. The other count was then dismissed at the Government's request. His points on appeal from the resulting conviction fall into two categories. The first repeats the same constitutional attacks on the federal wagering tax statutes that were advanced in the earlier cases. His other point is that the conscious generation of publicity by the Government and statements by Chief Judge Timbers in the course of other proceedings in January and February, 1965, prior to Grassia's change of plea,[1] see *United States* v. *Costello, supra,*

---

[1] The judge's statements were the basis of one of several motions by Grassia to dismiss the indictment or for a continuance.

—— F. 2d at ——, slip opinion at 3325-26; *United States* v. *Piccioli, supra,* —— F. 2d ——, slip opinion at 3340-41, so prejudiced his opportunity for a fair trial that the indictment should have been dismissed.

The first group of contentions, challenging the constitutionality of the federal wagering tax statutes, survive the plea of *nolo contendere,* as the Government concedes. But, so far as this Court is concerned, they have been determined adversely to Grassia by *United States* v. *Costello, supra,* —— F. 2d ——, slip opinion, 3322-25. Recognizing that the rationale of *Albertson* v. *Subversive Activities Control Board,* —— U. S. —— (1965), announced subsequent to our *Costello* opinion, may lead the Supreme Court to overrule its previous decisions in *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination.

As to Grassia's other contention, that his right to a fair trial was compromised by adverse publicity, the United States concedes that, at the time of the change of plea and the dismissal of the second count, counsel made clear to the prosecutor and the court that Grassia intended to press the point on appeal, contrast *United States* v. *Doyle,* 348 F. 2d 715, 720 (2 Cir. 1965); but it urges that a claim of the impossibility of obtaining an impartial trial is necessarily foreclosed when the defendant, freely and with the assistance of counsel, decides not to have one. Grassia responds that a defendant cannot be required to undergo a trial which the prosecution or the court has forced to occur at a place or a time that is inconsistent with the guarantees

of the Sixth Amendment. His point is that the Amendment guarantees not only trial by an impartial jury but a "speedy" trial in the district where "the crime shall have been committed." He says that when this has been made impossible by the Government, as distinguished from third parties, the conventional remedies of extended continuance or change of venue are inappropriate since these involve a sacrifice of Sixth Amendment rights, and the only suitable remedy is dismissal of the indictment, thus rendering inconsequential any plea of *nolo contendere* and waiver of trial.

We do not find it necessary to consider whether a case might conceivably arise where the Government's conduct in generating publicity had been so egregious and the prejudice engendered by it so pervasive, cf. *Irvin* v. *Dowd*, 366 U. S. 717 (1961), that the drastic sanction of dismissal of the indictment would be demanded, in the interest of the particular defendant or for general therapeutic purposes, or for both. It suffices for decision here that the hurdle confronting any such claim must be exceedingly high and that Grassia does not come close to meeting it. Although we disapprove of what seems to have been needless intensification by the Government of the news of the arrests and, still more, of the unnecessary statements by the Chief Assistant United States Attorney on the two following days, see *United States* v. *Costello, supra,* —— F. 2d at ——, slip opinion, 3326, it proved possible to obtain impartial juries even at Bridgeport where the publicity was at its peak, see *United States* v. *Piccioli, supra,* —— F. 2d at ——, slip opinion, 3336-37; *United States* v. *Markis, supra,* —— F. 2d at ——, slip opinion, 3344. Criminal defendants are under-

standably prone to exaggerate the interest their fellow citizens take in matters of such acute concern to them. The transfer of Grassia's trial to Hartford, also within the "district," on December 4 on his request, although doubtless prudent, thus did not result from any demonstrated impossibility of obtaining a speedy trial by an impartial jury in Bridgeport.[2] And although the fact that defendants arrested in the October raid were still awaiting trial rendered Chief Judge Timbers' statement of February 8, 1965, even more ill-advised than we indicated in *United States* v. *Piccioli, supra,* —— F. 2d at ——, slip opinion, 3342, we are wholly unconvinced that this pronouncement, combined with the preceding publicity generated by the prosecutor and the judge, made it so plainly impossible to obtain an impartial jury in Hartford as to relieve Grassia of any need to develop the facts by adhering to his plea of not guilty and examining the venire at Hartford on a voir dire.

Affirmed.

---

[2] As indicated in *United States* v. *Costello, supra,* —— F. 2d at ——, slip opinion, 3327, jury panels at the terms held in Bridgeport are not limited to residents of that city.

Statutes, Constitutional Provisions, and Regulations Involved

68A Stat. 525 (1954), 26 U. S. C. §4401 (1958): *Imposition of tax*

(a) Wagers—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

68A Stat. 527 (1954), 26 U. S. C. §4411 (1958): *Imposition of tax*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

68A Stat. 527 (1954), 26 U. S. C. §4412 (1958): *Registration*

(a) Requirement—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information—In accordance with regulations prescribed by the Secretary, he or his dele-

gate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

68A Stat. 851 (1954), 26 U. S. C. §7203 (1958): *Willful failure to file return, supply information or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

68A Stat. 732 (1954), 26 U. S. C. §6011 (1958): *General requirement of return, statement, or list*

(a) General rule.—When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

Amend. V, U. S. Const.: *Capital Crimes; Double Jeopardy; Self-incrimination; Due Process; Just Compensation for Property.*

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amend. VI, U. S. Const.: *Jury Trial for Crimes, and Procedural Rights.*

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amend. X, U. S. Const.: *Reserved Powers to States.*

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

26 C. F. R. §44.4412-1 (B)(2): *Registration.*

"(2) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked "Supplemental," each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see §44.4905-2.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 906

ALFRED GRASSIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted upon his plea of *nolo contendere* to one count of a two-count indictment charging him with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by § 4412. He was sentenced to imprisonment for four months and fined $2,500. The second count was dismissed on the government's motion.

Petitioner was one of approximately forty-five individuals arrested on October [redacted], 1964, in connection with a coordinated campaign against violators of the Wagering Tax Statute in the Bridgeport, Connecti-

cut area. He challenges the constitutionality of the statute when measured against the Fifth and Tenth Amendments, advancing contentions which are the same as those raised in the petition filed this term by James Marchetti (No. 823), Frank Costello (No. 826), and Arthur Gjanci (No. 1028 Misc.). Those contentions are answered by our combined brief in response to the cited petitions. See, also, *United States* v. *Angelini*, 346 F. 2d 278 (C.A. 7), certiorari denied, 382 U.S. 838.

Additionally, he claims that he is entitled to a dismissal of his indictment because of allegedly prejudicial pretrial publicity which he asserts was generated by both the government and the trial court. The publicity attributed to the government arose from a press release issued contemporaneously with the arrests, in which petitioner—unlike Marchetti, Costello and Gjanci (See Brief for the United States in Opposition, Nos. 823, 826, and 1028 Misc., this Term, p. 8)—was not mentioned by name. The publicity attributed to the trial court arose from a public statement by the Chief Judge subsequent to the trials of most of the defendants, but prior to the date set for petitioner's trial, in which the judge inveighed against the evils of gambling and praised the Revenue Service agents for their efforts in enforcing the Wagering Tax Statute.

Petitioner, unlike the other defendants, moved for and was granted a change of venue to Hartford, which was removed from the center of the publicity. When his case was called, he moved for a dismissal

and, in the alternative, for a continuance, both of which were denied. He then pleaded *nolo contendere*, but indicated his intention of appealing from the judgment entered.

Petitioner's contentions on this point do not survive his plea. He can hardly claim that a fair trial was impossible at the time and place set when, by his plea, he foreclosed all opportunity to determine whether one could be had. He was clearly not entitled to dismissal of the indictment. It cannot be said as a matter of law that the prejudicial effect of publicity is "so permanent, and ineradicable by mere lapse of time, that the court should have recognized the impossibility of a fair trial ever being held at any time within the foreseeable future." *Delaney* v. *United States*, 199 F. 2d 107, 112 (C.A. 1); *Harney* v. *United States*, 306 F. 2d 523, 532, n. 4 (C.A. 1), certiorari denied *sub nom. O'Connell* v. *United States*, 371 U.S. 911.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

FILED
APR 1 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1310

JAMES J. DRISCOLL, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

FRANCIS J. DIMENTO
100 State Street
Boston, Massachusetts 02109
Tel: (Area Code 617) 523-5253
Attorney for Petitioners

Of Counsel:
JAMES J. SULLIVAN, JR.
PAUL J. BURNS
RONALD R. POPEO
DIMENTO & SULLIVAN

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinions Below	2
Judgments Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
I. The Lower Court Has Decided an Important Question of Constitutional Law Which Is Now Pending before This Court	5
II. Questions of Broad Importance to the Administration of Criminal Justice in the Federal Courts Are Presented	7
A. *Lesser-Included Offense Instruction*	7
B. *Duplicity: The Charge as Both Principal and Agent*	10
Conclusion	11
Appendix A—Opinion of Court of Appeals in *Driscoll, et al.*	1a
Appendix B—Opinion of Court of Appeals in *Flaherty*	17a
Appendix C—Judgments of Court of Appeals	20a
Appendix D—Statutes, Regulations, & Rules Involved	25a

Table of Citations

Cases

Albertson, et al. v. *Subversive Activities Control Board*, ——— U.S. ———	6
Altiere v. *United States*, No. 100, ——— U.S. ———	7
Berra v. *United States*, 351 U.S. 131	8
Blockburger v. *United States*, 284 U.S. 299	10, 11
Costello v. *United States*, No. 826, ——— U.S. ———	5, 7
Gore v. *United States*, 357 U.S. 386	10

Page

Lewis v. *United States*, 348 U.S. 419 6
Markis v. *United States*, ____ U.S. ____ 6, 7
Moretti v. *United States*, No. 951, ____ U.S. ____ ... 6
Morgan v. *Devine*, 237 U.S. 632 ..... 10, 11
Piccioli v. *United States*, No. 849, ____ U.S. ____ ... 6
Sansone v. *United States*, 380 U.S. 343 8
Sparf v. *United States*, 156 U.S. 51 ..... 7, 8, 9
Stevenson v. *United States*, 162 U.S. 313 ..... 7, 9
United States v. *Kahriger*, 341 U.S. 22 (1953) 6

Statutes

18 U.S.C. § 371 3
§1084 3
§1952 3
§1953 3
26 U.S.C. §4401 3
§4411 ..... 3, 4
§4412 ..... 3, 10
§7203 ..... 3, 4
§7262 ..... 3, 4, 8
28 U.S.C. §1254(1) 3
Mass. Gen. Laws, Ch. 271, §7 3
§15 3

Rules

United States Supreme Court Rule 22(2) 3

In the
Supreme Court of the United States

OCTOBER TERM, 1965

No.

JAMES J. DRISCOLL, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit entered in the above-entitled cases on January 31, 1966.

The petitioners are James J. Driscoll, Edward J. Geraghty, James L. Maguire, Paul J. Watson, and Martin J. Flaherty.[1] The first four-named petitioners were joined in one indictment and tried together in the District Court, and their appeals heard by the Court of Appeals on a

[1] Two other defendants below, William A. Yakabowicz and William J. Dwyer, whose appeals to the Court of Appeals were consolidated with those of the first four-named petitioners, are not petitioners here.

printed consolidated record appendix. The last-named petitioner, Flaherty, was prosecuted by separate information and trial before another judge, and his conviction reviewed separately by the Court of Appeals. However, two of the three issues presented here are shared by him.

Opinions Below

There was no opinion in the United States District Court for the District of Massachusetts in any of the cases.

The opinions of the Court of Appeals for the First Circuit are not yet reported, but are annexed hereto as Appendices A (*Driscoll, et al.* v. *United States*) and B (*Flaherty* v. *United States*).

Judgments Below

The judgments of the United States District Court for the District of Massachusetts were entered in the *Driscoll, et al.* case on January 5, 1965 (Dr. R. 3)[2] and are set out at Dr. R. 32-36. In the *Flaherty* case, the judgment of the trial court was entered on May 27, 1965 (Fl. R. 2)[3] and is set out at Fl. R. 88-89.

The judgments of the Court of Appeals for the First Circuit were entered in all cases on January 31, 1966, and are annexed hereto as Appendix C.

Jurisdiction

The judgments sought to be reviewed are dated, and were entered, January 31, 1966.

---

[2] *Dr. R.* will hereinafter be used as a reference to the Consolidated Record Appendix to Brief for Appellant filed below in the *Driscoll, et al.* case.

[3] *Fl. R.* will hereinafter be used as a reference to the Consolidated Record Appendix to Brief for Appellant filed below in the *Flaherty* case.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1) and Rule 22 (2).

Questions Presented

1. Do the registration provisions of the wagering tax laws violate the constitutional privilege against self-incrimination, particularly when applied to persons alleged by the Government to have been joint venturers, employees, or conspirators in the wagering business. (All petitioners).

2. In a prosecution for wilful failure to purchase a wagering tax stamp, is the defendant entitled to an instruction on the lesser-included, non-wilful offense, where no evidence has been offered by him on the issue of wilfulness. (All petitioners except Driscoll and Flaherty).

3. Should a count charging the defendant both as principal and agent in the wagering business be dismissed for duplicity. (All petitioners).

Statutes Involved

The statutes involved in these cases are 18 U.S.C.A. §§ 371, 1084, 1952, 1953, and 26 U.S.C.A. §§ 4401, 4411, 4412, 7203, 7262, and Mass. Gen. Laws, Ch. 271, Secs. 7, 15. The pertinent text of these statutes, as well as regulations and rules herein involved, are annexed hereto as Appendix D.

Statement of the Case

On November 4, 1964, an indictment in nine counts was returned against petitioners Driscoll, Geraghty, Maguire, and Watson. Count One charged these four petitioners with conspiring to defraud the Government of wagering taxes in violation of 18 U.S.C. §371. The fifth petitioner here,

Flaherty, and five others were named as co-conspirators but not defendants in this count. (Dr. R. 6-9).

Counts Two, Four, Six, and Eight, respectively, charged the same four petitioners with the substantive offense of wilfully failing to pay the special occupational tax required by 26 U.S.C. 4411; in violation of 26 U.S.C. 7203 (Dr. R. 9-10).

Counts Three, Five, Seven, and Nine, respectively, were dismissed by the trial court (Dr. R. 2) and are not in issue here.

On the same date, November 4, 1964, an information in two counts was returned against the petitioner Flaherty, charging him in the first count with the wilful failure to pay the special occupational tax. (Fl. R. 3); the second count is not in issue here because ordered dismissed by the Court of Appeals.

Each petitioner pleaded not guilty and duly moved to dismiss the counts in which he was named as a defendant. All substantive counts were challenged for duplicity in that each such count charged the defendant as both a principal and an agent. (Dr. R. 10-11; Fl. R. 4). Moreover, the petitioners sought dismissal of all counts for the reasons that the statute on which the indictment and information were founded is unconstitutional on its face and in its application to these petitioners. (Dr. R. 11; Fl. R. 4-5). The motions on all these grounds were denied by the two trial judges involved.

At the joint trial of Driscoll, Geraghty, Maguire, and Watson, with respect to the substantive counts of wilful failure to purchase the wagering tax stamp, all the defendants requested, and were denied, an instruction to the effect that the jury could find any of them guilty of the lesser-included offense, namely, the non-wilful failure to pay the special tax, under 26 U.S.C.A. §7262 (Dr. R. 29, 31). There was evidence on the issue of wilfulness that

Geraghty, Maguire, and Watson had been advised of the requirements of the wagering tax laws in 1957 and 1960 (the date of the alleged offense was December, 1963) and that Watson and Driscoll had committed acts in concealment of the unlawful lottery.[4]

Driscoll, Geraghty, Maguire, and Watson were all acquitted by the jury on the conspiracy count and convicted on the respective counts charging each with the substantive offense of failure to purchase the wagering tax stamp. Driscoll was awarded a new trial on the lesser offense issue and the convictions of the other three were affirmed by the Court of Appeals. That court also dismissed the count charging Flaherty with the wilful failure to register and, on an evidence issue, ordered a new trial on the count charging the wilful failure to purchase the tax stamp. In all cases, the Court of Appeals upheld the refusal of the trial judges to dismiss the charges in their entirety.

Since the Court of Appeals reversed the trial court's refusal to give Driscoll the lesser offense instruction, that issue is not here raised by Driscoll. Moreover, since the trial judge before whom Flaherty was tried gave the requested instruction, the issue is absent also in Flaherty's petition.

Reasons For Granting the Writ

I. The Lower Court Has Decided an Important Question of Constitutional Law Which Is Now Pending before This Court

At the session of March 21, 1966, this Court granted certiorari in *Costello* v. *United States*, No. 826, on the following questions:

---

[4] The evidence relating to the issue of wilfulness was printed in its entirety by the Government as a record appendix to its brief in the Court of Appeals and appears at Dr. R. 63-76.

1. Do the federal wagering tax statutes violate defendant's Fifth Amendment privilege against self-incrimination?

2. Should *U. S.* v. *Kahriger*, 341 U.S. 22 (1953), and *Lewis* v. *U. S.*, 348 U.S. 419 (1955), upholding the constitutionality of the federal wagering tax laws, be reconsidered and overruled in view of this Court's recent decision in *Albertson, et al.* v. *Subversive Activities Control Board*, U.S. , 86 S. Ct. 194 (decided Nov. 15, 1965)?

Precisely the same questions have been preserved and presented here.[5] Although not mentioned by the court below, the *Albertson* case, which was decided after filing of the petitioners' brief below, was briefed by the Government and argued by all parties.

Moreover, since four of the petitioners were charged as defendants, and the fifth petitioner as a co-conspirator, in a conspiracy count, and, since all five petitioners were charged in substantive counts as employees of another person, the instant cases present the further question whether, as applied to these petitioners, the registration requirements of the wagering tax laws compel disclosure of incriminatory evidence of a *past* conspiracy to engage in gambling in the future. The possibility of such a situation was first suggested by Justice Black, dissenting in *Lewis*, 348 U.S. at 424, 75 S. Ct. at 419:

> "And for conspiring with his employers or employees to promote a lottery even in the future, which compulsory registration is designed to reveal, petitioners could be punished. . . ."

---

[5] These questions have been presented also in three other, pending petitions: No. 848, *Markis* v. *U. S.*; No. 849, *Piccioli* v. *U. S.*; and No. 951, *Moretti* v. *U. S.*

We respectfully submit, therefore, that the importance of the question of constitutionality has already been established by this Court's grant of review in *Costello* and that the further question of constitutionality as applied to these petitioners deserves review in its own right.

II. Questions of Broad Importance to the Administration of Criminal Justice in the Federal Courts Are Presented

A. *Lesser-Included Offense Instruction*[6]

We shall not presume to estimate the number of federal criminal trials in which the offense charged is capable of reduction to a lesser offense by the elimination of a single element of the crime. It is enough to say that the number must surely be a substantial portion of the total. Yet, there are only four reported opinions of this Court on the subject. Two of them were decided in the last century, namely, *Sparf* v. *United States*, 156 U.S. 51, 15 S. Ct. 273 (1895), and *Stevenson* v. *United States*, 162 U.S. 313, 16 S. Ct. 839 (1896). Both these cases deal with the question of reduction from murder to manslaughter and, when read together, leave no doubt that, so long as there is "*any* evidence fairly tending to bear upon the issue of manslaughter, it is the *province of the jury* to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter." (emphasis added). 162 U.S. at 323, 16 S. Ct. at 843.

In *Stevenson*, this Court held that there was indeed some

---

[6] This question has been presented also in another pending petition, No. 848, *Markis* v. *U. S.* (see footnote 5, *supra*), and, on January 17, 1966, in No. 100, *Altiere* v. *U. S.*, a petition presenting the same question was granted, the judgment vacated, and the case remanded for further proceedings.

evidence justifying a reduction to manslaughter and that the question should have been submitted to the jury. On the other hand, in *Sparf*, the Court held that, "on account of the *absence of all evidence* tending to show that the defendants were guilty of manslaughter, they [*i.e.*, the jury] could not, consistently with law, return a verdict of guilty of that crime." (emphasis added). 156 U.S. at 101, 15 S. Ct. at 293.

The only modern Supreme Court cases on the subject are *Berra* v. *United States*, 351 U.S. 131, 76 S. Ct. 685 (1956), and *Sansone* v. *United States*, 380 U.S. 343, 85 S. Ct. 1004. In *Berra*, the Court held merely that the offense on which an instruction was requested was not included within the offense charged. Similarly, in *Sansone*, it was held that the lesser offense instruction was not proper where the defendant had conceded the existence of the additional elements constituting the greater offense and had thus created an "overlapping" of offenses.

In the instant case, the question considered by the court below was whether petitioners Geraghty, Maguire, and Watson were required to come forward with evidence of the *absence* of wilfulness in order to create the disputed issue of fact which would have entitled them to an insruction on the lesser offense, namely, the non-wilful failure to pay the special tax. 26 U.S.C.A. §7262. The court then proceeded to hold, in effect, that an issue of fact is "disputed" within the meaning of *Sansone* only if, in the judgment of the trial court, the evidence on the issue is fairly in balance. On the other hand, according to the opinion of the lower court, the issue is not "disputed" if the Government, in the judgment of the court, has made out a compelling case of wilfulness which is uncontroverted on the evidence.

No such principle, we submit, can be extracted from any of the opinions of this Court on the subject. On the con-

trary, the opinions in *Stevenson* and *Sparf* are quite explicit to the effect that it is not the function of the trial court to weigh the evidence in determining whether to submit the lesser offense to the jury. What the court below failed to grasp was that, in *Stevenson* and *Sparf*, some affirmative evidence in excuse or mitigation was required to *reduce* the offense from murder to manslaughter, whereas, in the instant cases, affirmative evidence of wilfulness was required to *raise* the offense from a non-wilful to a wilful violation. Accordingly, in *Sparf* and *Stevenson*, it was necessary for the court to determine whether there was any evidence at all to justify submission of the *lesser* offense to the jury. On the other hand, the only issue here for determination by the court should have been whether there was sufficient evidence to justify submission of the *greater* offense to the jury. The court below should never have been concerned with the question whether there was evidence of non-wilfulness. Much less should it have concerned itself with the weight or credibility of the evidence on the issue.[7]

The interpretation placed on the opinions of this Court by the lower court introduces an entirely new and erroneous concept into the law. Whenever a lower court holds, as the court below has in this case, that the credibility and weight of the evidence is a judicial function, even in a limited area of a criminal trial, then, we submit, review by this Court is warranted almost as a *matter of course*.

---

[7] Of course, if, by stipulation or judicial admission, the petitioners had removed the element of wilfulness from the area of dispute into which it was originally placed by the plea of not guilty, the lesser offense would then have been properly withheld from the jury.

B. *Duplicity: The Charge as Both Principal and Agent*

In *Morgan* v. *Devine*, 237 U.S. 632, 641, 35 S. Ct. 712, 715 (1915), the Court said:

> "... this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes."

In *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932), approved in *Gore* v. *United States*, 357 U.S. 386, 388, 78 S. Ct. 1280, 1282 (1958), the Court said:

> "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

Here, the "act or transaction" involved is the physical receipt of wagers; the "distinct statutory provisions" are Paragraphs 2 and 3 of 26 U.S.C.A. §4412(a); and the difference in the proof required is that, under Paragraph (2), the defendant's status as a principal and his failure to register his place of business and the names and addresses of his agents must be proved, whereas, under Paragraph (3), his status as an agent and his failure to register the names and address of his principals must be proved. The analogy with *Blockburger* is virtually perfect.

The lower court, however, took a different view and said:

> "The present cases come within the authority of cases which state that where a statute specifies several ways in which an offense may be committed, they may be charged in one indictment or count, using the conjunctive to connect them."

Concededly, there are many cases supporting this statement. On the other hand, it is difficult to reconcile it with the language of the opinions in *Morgan* and *Blockburger*. In view of the frequency with which Government prosecutors string together in one count charges of the various acts condemned by related, but distinct, statutory provisions, it is submitted that the instant cases offer the Court an excellent opportunity to eliminate a constantly recurring subject of controversy in the trial courts.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS J. DIMENTO
100 State Street
Boston, Massachusetts 02109
Tel: (Area Code 617) 523-5253
Attorney for Petitioners

Of Counsel:
JAMES J. SULLIVAN, JR.
PAUL J. BURNS
RONALD R. POPEO
DIMENTO & SULLIVAN

March 24, 1966

Appendix A

United States Court of Appeals
For the First Circuit

No. 6494.

JAMES J. DRISCOLL,
DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE;

No. 6495. EDWARD J. GERAGHTY *v.* SAME;

No. 6496. JAMES L. MAGUIRE *v.* SAME;

No. 6497. PAUL J. WATSON *v.* SAME;

No. 6498. WILLIAM A. YAKABOWICZ *v.* SAME:

No. 6499. WILLIAM J. DWYER *v.* SAME.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Francis J. DiMento, with whom *James J. Sullivan, Jr.*, *Ronald R. Popeo* and *Paul J. Burns* were on brief, for appellants.

William B. Duffy, Jr., with whom *W. Arthur Garrity, Jr.*, United States Attorney, and *Edward F. Harrington*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT

ON REHEARING AND REVIEW.

January 31, 1966.

COFFIN, *Circuit Judge.* These appeals stem from judgments in three separate trials originating from one indictment and two informations for alleged violations of federal wagering tax statutes.

In the first trial, appellants Driscoll, Geraghty, Maguire and Watson were alleged to have conspired together and with others (including appellants Yakabowicz and Dwyer who were named as co-conspirators but not as defendants) to defraud the United States of the $50 special occupational tax imposed on wagering and of the 10% excise tax imposed on wagers. In addition, each of the same four appellants was charged with willful failure to pay the special occupational tax prior to engaging in the business of accepting wagers and receiving wagers for or on behalf of a person liable for the tax on wagers, as required by 26 U.S.C. § 4411.[1] It was also alleged that each of these four appellants willfully failed to register and to file returns as required by 26 U.S.C. § 4412, which counts were dismissed by the court below. The jury returned verdicts of not guilty on the conspiracy counts for all four appellants and guilty on the remaining individual counts charging willful failure to pay the tax.

In the second case appellant Yakabowicz and one Kennedy were charged in one count with willful failure to pay the special occupational tax and, in a second count, with willful failure to register and file returns. As in the first case, the latter count was dismissed. The jury ac-

---

[1] Section 4411 provides:

"There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

quitted Kennedy and returned a verdict of guilty against appellant Yakabowicz.

In the third case a jury trial was waived. This case arose out of an information against appellant Dwyer containing two counts. The first count charged willful failure to pay the special occupational tax. The second count charged willful failure to register and file returns (with language identical to the counts which were dismissed in the first and second cases). Neither count was dismissed, motion to dismiss having been denied *in toto*, and the court found appellant Dwyer guilty under both counts.

I

The first ground for reversal, asserted by all appellants except Dwyer, was the failure of the trial court, on request, to give an instruction that the jury could return a verdict of guilty of the lesser-included offense of non-willful failure to pay the special occupational tax.

The appellants were charged with willful failure to pay the special occupational tax required by 26 U.S.C. § 4411, in violation of 26 U.S.C. § 7203. The statutes create, in 26 U.S.C. § 7262, another crime, the non-willful failure to pay the tax. Since the crime defined in § 7262 contains all the elements of the crime defined in § 7203 except the element of willfulness, and results in a lesser penalty, it creates a lesser offense of which a defendant may be found guilty, in proper circumstances, if he is charged with and tried for a violation of § 7203.

Rule 31(c) of the Federal Rules of Criminal Procedure provides that a defendant may be found guilty of any "offense necessarily included in the offense charged". There is no question but that all of the elements of a non-willful failure to pay are included within the offense of willful failure to pay. The critical question is whether

the state of the evidence in these cases required the giving of the lesser offense instruction.

The relevant evidence, in abbreviated form, is the following. In 1957 government agent Green had interviewed appellants Geraghty, Watson, and Maguire, and had presented each with "an affidavit relating to the federal wagering tax law", which each read, said he understood, but refused to sign. In 1960, government agent Savage again interviewed appellants Geraghty and Watson, talked about an affidavit required by the federal wagering tax law, and gave each a copy which he had filled out. This form of affidavit, which was in evidence, set forth that the affiant had been advised of the requirement of the $50 special tax, the 10% excise tax, the records required to be kept, and that he was not engaged in the wagering business. Neither appellant, after reading the affidavit, was willing to sign it. A third witness, Frugoli, gave testimony of being with appellants Watson and Driscoll on premises (The Pen Tavern) used for placing bets, and seeing these appellants, immediately after two lights inside the tavern had been extinguished by a look-out, burning pieces of paper below the bar. A fourth witness, Noonan, testified to a conversation with appellant Yakabowicz about wagering and the need to have a stamp. Yakabowicz answered, according to this witness, that he "had read about it in the newspapers; that I didn't think I needed one, that I was not a gambler."

No rebutting or contradictory evidence was presented. Appellants urge that no evidence was needed to create a dispute as to willfulness, since the issue had been raised by their pleas of not guilty. It was argued that the juries could have disbelieved some of the government's witnesses. Alternatively, say appellants, the juries could have believed the witnesses as to appellants' knowledge of the law but still have found missing the added ingredi-

ent of intent to disobey it. It any event, appellants argue that the court was invading the province of the juries in refusing to give them the option of returning verdicts of guilty of non-willful failure to pay the tax.

We disagree as to the cases of all appellants except Driscoll. In his case, because of the nature of the evidence involving him, we think such an instruction should have been given.

The Supreme Court, in *Sparf* v. *United States,* 1895, 156 U.S. 51, dealt with a conviction for murder and refused to reverse it for failure of the trial court to give a manslaughter instruction to the jury, saying, 156 U.S. at 63-64:

> "A verdict of guilty of an offense less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict. There was an entire absence of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault. A verdict of that kind would have been the exercise by the jury of the power to commute the punishment for an offense actually committed, and thus impose a punishment different from that prescribed by law."

This was followed, a year later, by *Stevenson* v. *United States,* 1896, 162 U.S. 313, where the Court reversed the trial court for failure to give the jury a manslaughter alternative, there being considerable evidence of sudden passion on the part of the defendant, as opposed to cold-blooded, deliberate purpose. The Court acknowledged (162 U.S. at 321) that there may be cases "where the uncontradicted evidence was so clear and overwhelming of a deliberate purpose" that a court might be justified in stating to the jury that the evidence, if believed, would justify conviction only for murder.

Berra v. *United States*, 1956, 351 U.S. 131, 134, cites both with approval; *Stevenson*, for the proposition that a lesser offense charge should be given "if the evidence justified it"; and *Sparf*, for the proposition that "the role of the jury . . . is to decide only the issues of fact, taking the law as given by the court."

It remained for *Sansone* v. *United States*, 1965, 380 U.S. 343, to give further guidance. Citing all three cases above noted, the Court said that a lesser-included offense instruction is only proper where there is "a disputed factual element", i.e., where "there are disputed issues of fact which would enable the jury rationally to find" that all elements of the lesser offenses had been proved. 380 U.S. at 351. The Supreme Court has long recognized that to hold otherwise "would only invite the jury to pick between the felony and the misdemeanor so as to determine the punishment to be imposed, a duty Congress has traditionally left to the judge." 380 U.S. at 350 n.6.

We take *Sansone* to mean that when the government has made out a compelling case, uncontroverted on the evidence, on an element required for the charged offense but not for the lesser-included offense, there is a duty on defendant to come forward with some evidence on that issue if he wishes to have the benefit of a lesser-included offense charge. To put it another way, while a judge cannot prevent a jury from rejecting the prosecution's entire case, he is not obligated, under these circumstances, to assist a jury in coming to an irrational conclusion of partial acceptance and partial rejection of the prosecution's case by giving a lesser-included offense instruction. Two prerequisites seem vital: that there be no factual dispute and that a finding contrary to the only evidence on the issue would be irrational.

Both prerequisites exist in the cases of appellants Geraghty, Maguire, Watson, and Yakabowicz. In these

cases direct evidence of appellants' knowledge of the existence of the federal wagering tax law had been introduced through three government witnesses. The record before us discloses no efforts to impeach, contradict, or explain this testimony. All we have are the pleas of not guilty.

We do not think that these pleas, standing alone, create the contradiction in evidence required by *Sansone, supra.* It is true that, at the outset of the case, the pleas of not guilty created an ultimate issue as to willfulness to be resolved by the jury. It is also true that by their silence in the face of specific and direct evidence on the issue of willfulness, appellants did not forfeit their right to have the jury instructed that willfulness must be proven beyond a reasonable doubt. But we think it is equally true that by remaining mute in the face of such evidence and relying solely on their pleas of not guilty, appellants did not create such a "disputed factual element" in the sense that entitled them to an instruction for a lesser-included offense. *Cf. Edwards* v. *United States,* 5 Cir., 1964, 334 F. 2d 360, *cert. denied,* 379 U.S. 1000.

In the recent case of *United States* v. *Markis,* 2 Cir., 1965, 352 F. 2d 860, evidence of similar nature (i.e., statements of a government agent of conversations with defendant about the requirement of a wagering stamp together with evidence of a covert gambling operation) had been introduced. This evidence had not been impeached. The court, while recognizing that the issue of willfulness was "disputed in the sense that it had to be submitted to the jury", nevertheless stated, 352 F. 2d at 867:

> "The mere fact that the jury was still free to disbelieve this portion of the agent's testimony does not elevate the issue to a truly 'disputed' one; in the language of the Model Penal Code § 1.07(5)(1962),

> it does not provide 'a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense'. Model Penal Code § 1.08 comment, at 42-43 (Tent. Draft No. 5, 1956). This hits the essential point. The lesser-included offense charge is not required simply because the jury could exercise its power of acquitting on the greater charge for no reason at all 'in the teeth of both law and facts' . . . ."

We see no error in the refusal of the trial court to give the lesser offense instruction in these four cases.[2]

In Driscoll's case, while there was no "disputed factual element", the evidence as to willfulness was capable of more than one reasonable inference. It was not that of confrontation with knowledge of the federal wagering tax law. It was evidence of his having a transaction with a group of men in the Pen Tavern, conversing with a lookout, carrying money and paper into the office after lights went out, throwing a piece of paper into a trash barrel, retrieving it, and burning it beneath the bar. The government contends that this is "uncontradicted circumstantial evidence of defendants' (Driscoll and Watson) knowledge that they were violating federal law." It cites *Spies* v. *United States*, 1943, 317 U.S. 492, and *United States* v. *Marquez*, 2 Cir., 1964, 332 F. 2d 162, *cert. denied*, 379 U.S. 890.

These cases do stand for the proposition that willful tax evasion can be proven by circumstantial evidence of

---

[2] Appellants' reference to our opinions in *DeCecco* v. *United States*, 1 Cir., 1964, 338 F.2d 797, and *Howard* v. *United States*, 1 Cir., 1965, 345 F.2d 126, *cert. denied* 382 U.S. 833, are not in point. In *DeCecco* we reversed a trial court for taking an issue away from the jury and in *Howard* we sustained a judgment based on a jury's finding as to intent. Obviously, the juries in the cases before us had the ultimate duty to pass on the issue of willfulness. All we say here is that there was not, on the evidence, such a factual dispute as to require a lesser offense charge from the court.

concealment of books and records *(Spies)*, and of the operation of a lottery *(Marquez)*. But the issue before us is not whether there was enough evidence of willfulness to support a guilty verdict. The issue is whether the uncontradicted evidence of Driscoll's knowledge of the federal wagering tax law was so unequivocal that the jury could not rationally find that his actions had to do solely with escaping detection and prosecution by the Commonwealth of Massachusetts for participating in the operation of a lottery.

On this issue, the language which the Supreme Court in *Ingram* v. *United States*, 1959, 360 U.S. 672, applied to employees in a covert gambling enterprise, is pertinent. It said that their intimate connection and cooperation with the secret conduct of a lottery "actually are colorless as to the vital issue of knowledge . . . that their superiors owed federal wagering taxes . . . . Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted." 360 U.S. at 679.

We do not say that the evidence as to Driscoll would be so "colorless" as not to support a guilty verdict. Perhaps a jury could reasonably infer that Driscoll knew of the federal stamp requirement from Watson, or that his own actions showed a conscious violation of federal, as well as state, law. But we do say that the evidence, even though undisputed, is not so compelling and unequivocal on the issue of willfulness that a jury finding of non-willfulness would be irrational. Hence, as to Driscoll, the requested lesser-included offense instruction should have been given.[3]

---

[3] This conclusion seems to be consistent with the recent action of the Supreme Court in remanding for reconsideration in the light of *Sansone* v. *United States*, *supra*, a request for a lesser-included offense instruction where the only evidence of knowledge and willfulness was circumstantial and possibly capable of more than one inference. *Altiere* v. *United States*, 34 U. S. L. Week 3243 (U.S. Jan. 18, 1966).

II

Appellants' second contention is that the indictment and informations should have been dismissed because registration and purchase of a wagering tax stamp would have violated their constitutional privilege against self-incrimination.

They do not challenge *Lewis* v. *United States*, 1955, 348 U.S. 419, or *United States* v. *Kahriger*, 1953, 345 U.S. 22, in which the Supreme Court upheld the registration requirements of the wagering tax statutes against assaults based on the Fifth Amendment. The statute was interpreted in *United States* v. *Kahriger, supra,* as being prospective with no compulsion on a defendant to confess to acts already committed, but with the requirement that "in order to engage in the business of wagering in the future he must fulfill certain conditions." 345 U.S. at 32-33.

This, say appellants, is good law when applied to failures of individuals to register and pay the tax. But, in the cases before us, appellants point out that (a) the government has asserted a conspiracy in which all appellants were allegedly involved, either as defendants or co-conspirators; (b) the government has joined appellant Yakabowicz and one Kennedy in one count of one information, charging them with willful failure to pay the special occupational tax; and (c) the government has charged each appellant with willful failure to pay the tax, having engaged in the business of accepting wagers and having engaged "in receiving wagers for or on behalf of a person liable for the tax".

Against this accusatory background, appellants say that, "under the Government's view of the facts", the very act of registration (which, under Internal Revenue Service Regulation 26 C.F.R. 44.4901-1(c)(1), is a prerequisite to issuance of the stamp) would be a "confession

to the past act of entry into a conspiracy to promote a lottery in violation of local laws" and would supply "incriminatory evidence of a past conspiracy to engage in gambling in the future". While this argument is directed chiefly to a conspiracy count, appellants urge that it also applies to the count linking appellant Yakabowicz and Kennedy in the single charge that they willfully failed to pay the special occupational tax, and to all the counts which charged appellants individually with "receiving wagers for or on behalf of" another. For, say appellants, a registration disclosing employment by another or a joint venture would also be the equivalent of a confession of a pre-existing conspiracy.

The conclusion of this line of reasoning is that since the issuance of a tax stamp requires prior registration, a joint venturer, employee, employer, or conspirator in wagering cannot be prosecuted for failure to purchase it, for he would be confessing his part in a conspiracy. Under this view, only the individual operator would be reached by the wagering tax statutes. Since any wagering enterprise involving more than one person, whether as owners or employees, could refuse to register with impunity, the wagering tax stamp would soon become of more interest to the stamp collector than to the tax collector.

Although the jury returned a verdict of not guilty on the conspiracy count, we do not feel that this ultimate result disposes of the argument. Taking the government's view of the case, as manifested by the conspiracy count, we look at the situation which would have confronted appellants had they agreed to form a conspiracy, at the moment when they should have registered and purchased a stamp.

In making the argument, appellants are repeating the essential argument made by Mr. Justice Black in his dissent in *Lewis* v. *United States, supra,* 348 U.S. at 423-425,

which did not persuade the majority. Indeed, the appellants have sought to carve out a conspiracy exception to the constitutionality of the wagering tax statutes by remembering the emphasis in *Kahriger* and forgetting that in *Lewis*. For while *Lewis* reiterates the *Kahriger* point that the registration requirement was a prerequisite to future engagement in the business of wagering, it added the concept that the acts of registration and paying the tax were not compulsory. The Court said, 348 U.S. at 422:

> "If petitioner desires to engage in an unlawful business he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefor, as in this case, he cannot be compelled to testify and may claim his privilege."

For the sake of argument, we may concede that registration of more than one person, manifesting intent to carry on a joint operation in wagering would constitute either a confession of a past act of entry into a conspiracy, violative of local law, or the furnishing of incriminatory evidence on a federal conspiracy charge. But, while such might be self-incrimination, it would not be compulsory. In such a case the prospective joint wagering entrepreneurs would have three choices: to register, purchase the stamp, and run the risks of investigation and prosecution under local lottery laws; to engage in the business without registering, preserve their privilege against self-incrimination, but run the risk of prosecution under the federal wagering tax laws; or, whatever conspiratorial plans had been laid, to take no further action, and to forego both the risks and the profits of the wagering occupation. Ad-

mittedly, these choices all have their price, but we are not dealing with an activity whose pursuit invokes a constitutional right or freedom.

The recent case, *United States* v. *Costello, et al.*, 2 Cir., 1965, 352 F.2d 848, in upholding convictions under both individual and conspiracy indictments for violating the wagering tax laws, citing *Lewis* v. *United States, supra,* as compelling authority, said "'. . . the probability of incrimination for future or even past acts, however great, is irrelevant on the Court's stated theory that the registration cannot be called compulsory.'' 352 F.2d at 851.

We find no error in the trial court's refusal to dismiss on this ground.

III

These appellants finally contend that the counts on which judgments of guilty have been imposed were duplicitous, and should have been dismissed for this reason. The position of each appellant is that he has been charged in the same count as both a principal and an agent in receiving wagers, and therefore with two crimes.

These counts charged each appellant with having engaged "in the business of accepting wagers . . . and . . . in receiving wagers for or on behalf of a person liable for the tax on wagers imposed by 26 U.S.C. § 4401, having willfully failed, prior to engaging in said business . . . to pay the special occupational tax as required by 26 U.S.C. § 4411 . . . ."

Appellants' argument is based on the different registration requirements applicable to principals and agents as set forth in 26 U.S.C. § 4412(a), paragraphs (2) and (3).[4] But the counts in question do not charge the appel-

[4] The complete text of Section 4412 is the following:

"(a) Requirement. — Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district —

lants with failure to register as principal and agent. They charge the offense of failure to pay the special tax under Section 4411, which is quoted fully in footnote 1, *supra*. As the court said in *United States* v. *Pasha*, 7 Cir., 1964, 332 F. 2d 193, 195, *cert. denied*, 379 U.S. 839, with reference to a similar count, ". . . the gravamen of the offense is the engaging in the business of accepting wagers either as principal or agent."

The present cases come within the authority of cases which state that where a statute specifies several ways in which an offense may be committed, they may be charged in one indictment or count, using the conjunctive to connect them. *Arellanes* v. *United States*, 9 Cir., 1962, 302 F. 2d 603, 609, *cert. denied*, 1963, 371 U.S. 930; *Kitchens* v. *United States*, 10 Cir., 1959, 272 F. 2d 757, 760-761, *cert. denied*, 362 U.S. 942; *Smith* v. *United States*, 5 Cir., 1956, 234 F. 2d 385, 389; *Mellor* v. *United States*, 8 Cir., 1947, 160 F. 2d 757, 760-761; *United States* v. *MacKenzie*, D. Me., 1959, 170 F. Supp. 797.

Rule 7(c) of the Federal Rules of Criminal Procedure is applicable. It provides in part: "It may be alleged in a single count that the . . . defendant committed the offense

---

"(1) his name and place of residence;

"(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

"(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

"(b) Firm or company. — Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

"(c) Supplemental information. — In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter."

. . . by one or more specified means." The note of the Advisory Committee to this rule states that it "is intended to eliminate the use of multiple counts for the purpose of alleging the commission of the offense by different means or in different ways." 4 Barron & Holtzoff, *Federal Practice and Procedure*, § 1913, p. 60 n. 28.

We agree with the decision of the trial court in not dismissing these counts for duplicity.

Appellant Dwyer challenges count 2 of the information filed against him on the ground that a charge of willful failure "to register and to file returns as required by 26 U.S.C. § 4412 and regulations thereunder" encompasses more than one offense.

We agree with this contention. Section 4412 provides, in paragraphs (a) and (b), for the furnishing of initial registration information. Paragraph (c) provides for the furnishing of supplemental information.[5] The regulations (26 C.F.R. § 44.4412-1) require an initial return on a Form 11-c and subsequent returns, on the same form, marked "supplemental", ten days after a new employee is engaged to receive wagers or a registrant is engaged to work for a new employer.

It is clear that the statute and the regulations contemplate a series of returns, failure to file any of which would constitute an offense. It seems equally clear that proof of failure to file an initial return would differ from proof of later failures. It cannot reasonably be said that a failure to file a subsequently required "supplemental" return is simply a way or means of violating the requirement of initial registration. *Cf. Bins* v. *United States*, 5 Cir., 1964, 331 F. 2d 390, *cert. denied*, 379 U.S. 880. Moreover, we cannot construe the count as referring only to the initial registration return, since it refers, in the plural,

---

[5] See fn. 3, *supra*.

to "returns". The refusal to grant Dwyer's motion to dismiss this count was in error.

Judgments will be entered affirming the judgments against Geraghty, Maguire, Watson, and Yakabowicz, but setting aside the verdict and vacating the judgment against Driscoll, and ordering a new trial not inconsistent herewith. The judgment against Dwyer on Count 1 of the information against him is affirmed. The judgment against Dwyer on Count 2 is reversed, and the cause is remanded to the District Court with a direction to dismiss Count 2 of the information against Dwyer.

Appendix B

United States Court of Appeals
For the First Circuit

No. 6574.

MARTIN J. FLAHERTY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*, MCENTEE, *Circuit Judge*, and SWEENEY, *District Judge*.

Francis J. DiMento, with whom *Ronald R. Popeo* and *DiMento & Sullivan* were on brief, for appellant.

Edward F. Harrington, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

January 31, 1966.

ALDRICH, *Chief Judge*. This is an appeal from convictions and a single sentence on a two-count information charging various wagering tax offenses. The second count is duplicitous, and should have been dismissed. *Driscoll* v. *United States*, 1 Cir., 1966, F.2d . The first count charged a willful failure to pay the $50 special occupational tax. Defendant objects, inter alia, to the use at trial of certain statements made to the arresting officers. The circumstances were these.

Federal agents arrested defendant on a warrant at his place of employment. Before removing him from the premises, after warning him of his right to remain silent but not of his right to counsel, an agent asked him a series of questions from a prepared form. Defendant answered all the questions, giving miscellaneous personal information, but insisting that he was not in the wagering business. Instead of asking directly whether he knew of the federal revenue requirements (to serve as a basis for charging a willful violation), the form question was phrased hypothetically, whether, if defendant were in the wagering business, he would have registered and purchased a federal stamp (*i.e.*, paid the special occupational tax). The defendant replied, "I suppose so. I would if I were in the business." At the trial, over objection, the government introduced defendant's statements of his name, address, and occupation, which it used as a foundation for its evidence that he had not registered or purchased a stamp, and introduced his response to the hypothetical question as an admission of his knowledge that he should have done so.

We cannot believe that after arrest the police must advise a suspect of his right to counsel before asking basic questions going to his identity, such as name, address, and occupation, even though the suspect may not appreciate to what use the answers might be put. Possibly, if a suspect fully understands his right to remain silent, the police can ask straightforward questions that go considerably further without advising him of his right to counsel. *Cf. United States* v. *Cone*, 2 Cir., 11/22/65, F.2d . This we need not decide, however, for the agent's hypothetical inquiry in the present case is quite a different matter. It was obviously a trick question, designed to induce the defendant inadvertently to incriminate himself. We say inadvertently because not only was the pur-

pose of the question concealed, but the incriminatory answer was precisely the one that would appear to be exculpatory. The government's devious purpose in so phrasing the question might be apparent to a lawyer. To a layman, the question was all candor and aboveboard.

Once a suspect has been arrested the government's minimum obligation is to show that his answers to questions were fully voluntary, including that they were given with an understanding of his right to remain silent. By cleverly phrasing the hypothetical question the government deliberately undercut the defendant's intelligent choice whether or not to answer, and in effect prevented him from freely exercising that right. The answer should not have been admitted into evidence.

Those of defendant's other points that merit discussion have been answered in *Driscoll* v. *United States, supra.* However, we should again remind the district court of the inappropriateness of instructing the jury that any portion of the government's evidence is "undisputed." As we indicated in *DeCecco* v. *United States,* 1 Cir., 1964, 338 F.2d 797, all issues not affirmatively conceded are "disputed" on a plea of not guilty. While it might not have that effect on a lawyer, to tell the jury that something is undisputed may well suggest that it is conceded. If the court wishes to comment on the evidence, or to summarize the evidence, it should ordinarily do so in a manner that does not reflect on the defendant's failure to offer rebuttal. See, also, regarding the danger inherent in referring to evidence as "uncontradicted," *Desmond* v. *United States,* 1 Cir., 1965, 345 F.2d 225; *Kitchell* v. *United States,* 1 Cir., 1966, F.2d .

Judgment will be entered setting aside the verdict of the jury on Counts 1 and 2 and vacating the judgment thereon, and ordering a dismissal of Count 2, and a new trial on Count 1 not inconsistent herewith.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6494.

JAMES J. DRISCOLL,
DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
January 31, 1966.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside, and the case is remanded to that Court for a new trial not inconsistent with the opinion filed today.

By the Court:

(s) ROGER A. STINCHFIELD
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6495.

EDWARD J. GERAGHTY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
January 31, 1966.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6496.

JAMES L. MAGUIRE,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
January 31, 1966.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6497.

PAUL J. WATSON,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
January 31, 1966.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6574.

MARTIN J. FLAHERTY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
January 31, 1966.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside, and the case is remanded to that Court with direction to dismiss Count Two of the information and for a new trial on Count One of the information not inconsistent with the opinion filed today.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

Appendix D

A. Statutes

18 U.S.C.A.:

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C.A.:

§1084. Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C.A.:

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution, offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C.A.:

§1953. Interstate transportation of wagering paraphernalia

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

26 U.S.C.A.:

§4401. Imposition of tax

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

26 U.S.C.A.:

§4411. Imposition of tax

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C.A.:

§4412. Registration

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such

supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

26 U.S.C.A.:

§7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C.A.:

§7262. Violation of occupational tax laws relating to wagering — Failure to pay special tax

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

Mass. Gen. Laws, c. 271:

§7. LOTTERIES; DISPOSAL OF PROPERTY BY CHANCE. Whoever sets up or promotes a lottery for money or other property of value, or by way of lottery disposes of any property of value, or under the pretext of a sale, gift or delivery of other property or of any right, privilege or thing whatever disposes of or offers or

attempts to dispose of any property, with intent to make the disposal thereof dependent upon or connected with chance by lot, dice, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property, and whoever aids either by printing or writing, or is in any way concerned, in the setting up, managing or drawing of such lottery, or in such disposal or offer or attempt to dispose of property by such chance or device, shall be punished by a fine of not more than two thousand dollars or by imprisonment for not more than one year.

Mass. Gen. Laws, c. 271:

§15. AIDING IN SETTING UP A LOTTERY FOR MONEY DRAWN OUT OF COMMONWEALTH. Whoever aids, either by printing or writing, or is in any way concerned in setting up, promoting, managing or drawing a lottery for money, set up, promoted, managed or drawn out of this commonwealth, shall be punished by a fine of not more than two thousands dollars or by imprisonment for not more than one year.

B. REGULATIONS

26 C.F.R.:

§44.4412-1 REGISTRATION

(a) IN GENERAL. Every person required to pay the special tax imposed by section 4411 shall register and file a return on Form 11-C. For provisions relating to the general requirement for filing a return, see § 44.6011(a)-1.

(b) INFORMATION TO BE REPORTED ON FORM 11-C. (1) Every person required to make a return on Form 11-C shall report thereon his full name and place of residence. A person doing business under an alias, style, or trade name shall give his true name, followed

by his alias, style, or trade name. In the case of a partnership, association, firm, or company, other than a corporation, the style or trade name shall be given, also the true name of each member and his place of residence. In the case of a corporation, the true name and title of each officer and his place of residence shall be shown.

(2) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked "Supplemental", each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see § 44.4905-2.

(3) Each agent or employee who receives wagers for or on behalf of a person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and residence address of each person (i.e., individual, partnership, corporation, etc.) on whose behalf wagers are to be received. Thereafter, the agent or employee shall file a return on Form 11-C, marked "Supplemental", each time he is engaged or employed to receive wagers for a person or persons other than the person or persons previously reported on Form 11-C. Such supplemental return shall be filed not later than 10 days after the date he is engaged to

receive wagers and shall show the name, business address, or, if none, the residence address of the person or persons by whom he is engaged to receive wagers. As to a change of address, see § 44.4905-2.

(c) TIME AND PLACE FOR FILING FORM 11-C. For provisions relating to the time for filing Form 11-C (other than Form 11-C marked "Supplemental"), see §§ 44.6071 and 44.6071-1. For provisions relating to the place for filing Form 11-C, see §§ 44.6091 and 44.6091-1.

26 C.F.R.:

§44.4901-1 Payment of special tax

. . . . . .

(c) Tax payment evidenced by special tax stamp. (1) Upon receipt of a return on Form 11-C, together with remittance of the full amount of tax due, the district director will issue a special tax stamp as evidence of payment of the special tax.

26 C.F.R.:

§44.6011 (a)-1 Returns

(a) In general. Every person required to pay the tax on wagers imposed by section 4401 of the Code shall make for each month, from the daily records required by §§ 44.4403-1 and 44.6001-1, a return on Form 730 in accordance with the instructions and regulations applicable thereto. A return shall be made for each month whether or not liability has been incurred for that month. If the taxpayer ceases operations which make him liable for tax, the last return shall be marked "Final Return".

C. Rules

Federal Rules of Criminal Procedure:

Rule 31. Verdict

. . . . . .

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1174

JAMES J. DRISCOLL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After trials by jury in the United States District Court for the District of Massachusetts, each of the petitioners was convicted on one or more counts of willfully failing to pay the special occupational gambling tax prescribed by 26 U.S.C. 4411. Petitioners Driscoll, Geraghty, Maguire and Watson were each sentenced to six months' imprisonment and to pay a $1,500 fine. Petitioner Flaherty was sentenced to three months' imprisonment. The court of appeals affirmed the convictions of Geraghty, Maguire and Watson. It reversed, on account of trial errors, the convictions of Driscoll and Flaherty (Pet. App. 1a–19a).

216-063—66

1. All petitioners contend that 26 U.S.C. 4411 violated their constitutional privilege against self-incrimination. Since this issue is before this Court in *Costello* v. *United States*, No. 826, this Term, certiorari granted, March 21, 1966, we suggest that it would be appropriate to defer action on the instant petition pending disposition of the *Costello* case. This procedure would be warranted even with regard to petitioners Driscoll and Flaherty—against whom there are no outstanding judgments of conviction—because their constitutional claim, if sustained, would bar a second trial.[1]

2. Petitioners Geraghty, Maguire and Watson argue, in addition, that the trial court erred in failing to instruct that they could be convicted of the lesser-included offense of non-willful failure to pay the special occupational tax (D. App. 29, 31).[2] The government's evidence on willfulness showed that a government agent had interviewed each of these petitioners sepa-

[1] We call to the Court's attention, however, the fact that the petition may be untimely with respect to Flaherty. In the *Flaherty* case, the government filed a petition for rehearing in the court of appeals which was denied on February 21, 1966. While it was pending, the other petitioners requested an extension of time to file a petition for a writ of certiorari so that they could file their petition jointly with Flaherty. On February 28, 1966, Mr. Justice Fortas extended their time for filing a petition to and including April 1, 1966. Petitioner Flaherty did not join in the request for an extension. On April 1, a joint petition for a writ of certiorari was filed, more than 30 days after the denial of the petition for rehearing in *Flaherty*.

[2] The record on file with the Clerk consists of the appendices to the briefs filed in the court of appeals in both the *Flaherty* and *Driscoll, et al.* cases. The appendices in the *Driscoll et al.* case are designated herein as "D. App."

rately in 1957. At the interviews, he presented each of them with an affidavit relating to the federal wagering tax law which each read, said he understood, but refused to sign (D. App. 63–64). In 1960 another agent interviewed petitioners Geraghty and Watson and again gave them a similar affidavit. This form advised them that a person must register and pay an occupational tax before engaging in the wagering business. Again, after reading the form, they refused to sign (D. App. 65–67).

A defendant's request for a lesser-included-offense instruction requires the court to make an appraisal of the evidence and determine whether there are "disputed issues of fact which would enable the jury rationally to find" that the defendant has committed the lesser but not the greater offense. *Sansone* v. *United States,* 380 U.S. 343, 351. The court below made such an appraisal and, as to these three petitioners, it could find no such disputed factual issues. The court concluded that the record discloses "no effort to impeach, contradict, or explain" the direct evidence that these petitioners had knowledge of the existence of the federal wagering tax laws (Pet. App. 7a). Under these circumstances, it cannot be said that the jury would have had any rational basis on which to choose between the misdemeanor charged and the claimed lesser offense. See *United States* v. *Markis,* 352 F. 2d 860 (C.A. 2), certiorari pending, No. 848, this Term.

3. The allegations in each count that the petitioners engaged in the wagering business and received wagers on behalf of a person liable for the wagering tax did not render the counts duplicitous. The offense defined in 26 U.S.C. 7203 is the willful failure to pay the re-

quired tax, irrespective of how the duty to pay arises. There is thus no substance to the claim that each count of the indictment charged two crimes.

Respectfully submitted.

THURGOOD MARSHAL,
Solicitor General.

MAY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

COURT. U. S.

FILED
MAY 10 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1174

RECEIVED
MAY 10 1966
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JAMES J. DRISCOLL, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONERS

FRANCIS J. DIMENTO
100 State Street
Boston, Massachusetts 02109
Tel: (Area Code 617) 523-5253
Attorney for Petitioners

Of Counsel:
JAMES J. SULLIVAN, JR.
PAUL J. BURNS
RONALD R. POPEO
DIMENTO & SULLIVAN

Blanchard Press, Boston, Mass. — Law Printers

In the
Supreme Court of the United States

OCTOBER TERM, 1965

No. 1174

JAMES J. DRISCOLL, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONERS

This reply is directed only to the question of the timeliness of Flaherty's petition, raised in footnote numbered 1 at page 2 of the Memorandum for the United States.

The docket of this Court indicates that, by order dated March 22, 1966, Mr. Justice Fortas extended Flaherty's time for filing his petition to and including April 1, 1966.

Although counsel for Flaherty had served the Solicitor General with a copy of Flaherty's application for exten-

sion of time, notice of its allowance was, through inadvertence, given to the United States Attorney rather than to the Solicitor General.

The apologies of counsel are respectfully extended to the Court and the Solicitor General for the inconvenience caused.

Respectfully submitted,

FRANCIS J. DIMENTO
100 State Street
Boston, Massachusetts 02109
Tel: (Area Code 617) 523-5253
Attorney for Petitioners

Of Counsel:
JAMES J. SULLIVAN, JR.
PAUL J. BURNS
RONALD R. POPEO
DIMENTO & SULLIVAN

Office-Supreme Court, U.S.
FILED
DEC 16 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~869~~ 32

JOSEPH SERAO, CHARLES CAFARO
and BENJAMIN GENETEMPO,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

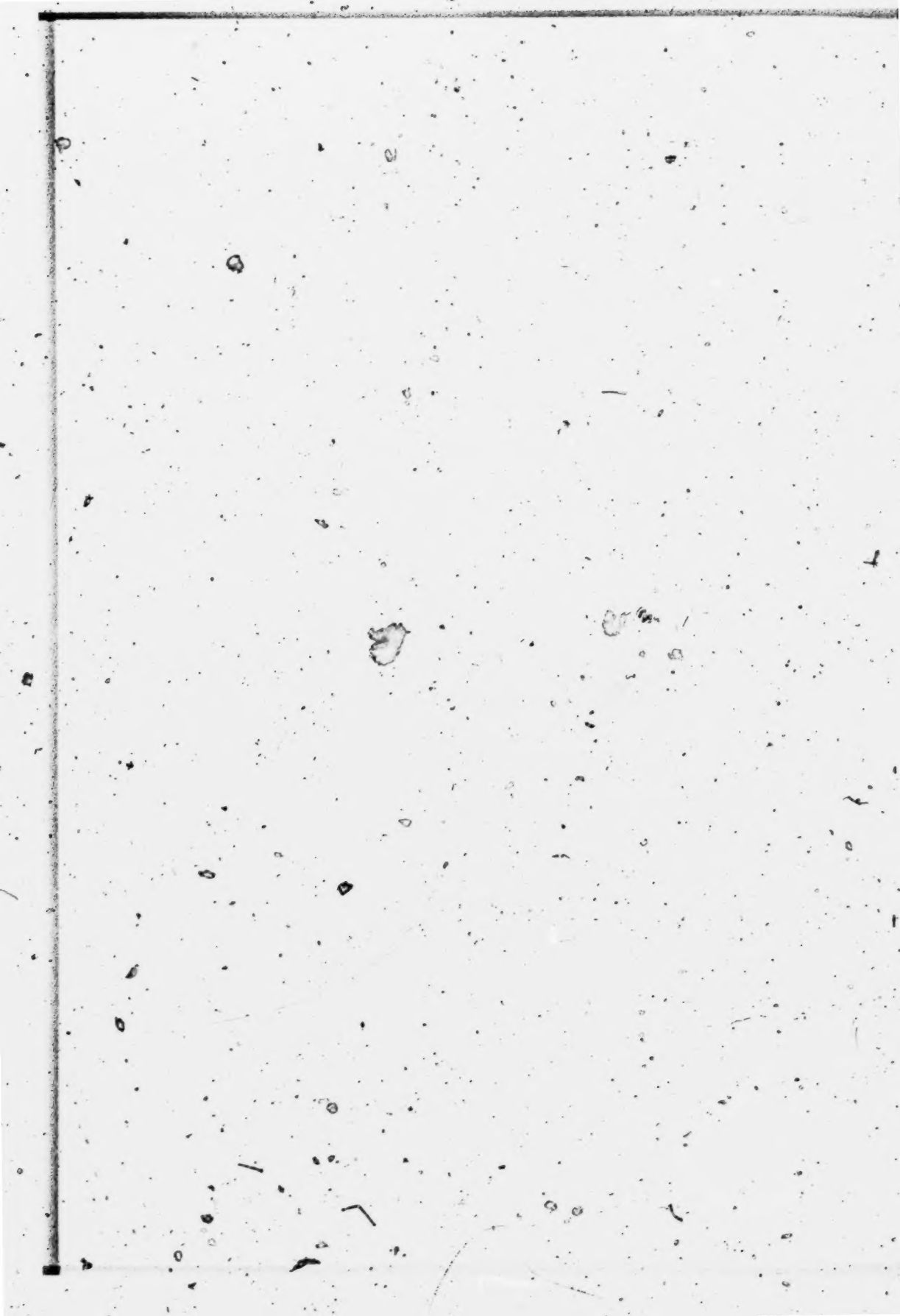
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT J. KRIEGER
401 Broadway
New York, N.Y. 10013

ROBERT KASANOF
52 Broadway
New York, N.Y. 10004

Attorneys for Petitioners

32 CAPE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540



INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	5
Reasons for Granting the Writ	7
A. The statutes under which the petitioners were convicted are unconstitutional	7
B. The warrant for the search of the 87th Street tally room was obtained in violation of the Fourth Amendment standards	7
Conclusion	14
Appendix A—Opinion of United States Court of Appeals	15
Appendix B—Judgment of United States Court of Appeals	23
Appendix C—Opinion by McGohey, D.J. on Pre-trial Motion	25

Authorities Cited

Cases

	PAGE
Aguilar v. Texas, 378 U.S. 108 (1964)	12
Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965)	2
Costello v. United States, No. 826 of the October 1965 Term, 34 LW 3320	7
Giordenello v. United States, 357 U.S. 480 (1958)	12
Grosso v. United States, 35 LW 3109	7
Lewis v. United States, 348 U.S. 419 (1955)	2
United States v. Kahriger, 345 U.S. 22 (1953)	2
United States v. Ventresca, 380 U.S. 102 (1965)	11

Statutes

26 U.S.C. 4401(c)	3, 5
26 U.S.C. 4411	3, 5, 9
26 U.S.C. 4412	3, 5
26 U.S.C. 7203	4
26 U.S.C. 7262	5
28 U.S.C. 1254 (1)	2

United States Constitution

Fourth Amendment	3
Fifth Amendment	2, 7

IN THE

Supreme Court of the United States

October Term, 1966

JOSEPH SERAO, CHARLES CAFARO
and BENJAMIN GENETEMPO,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned case on October 20, 1966.

Citations to Opinions Below

The opinion of the Court of Appeals is as yet unreported and is printed as Appendix A hereto, *infra,* p. 15. The judgment of the Court of Appeals is printed as Appendix B hereto, *infra,* p. 23. The opinion of the District Court in regard to the defendants' pretrial motion to suppress is printed as Appendix C hereto, *infra,* p. 25.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on the 20th day of October, 1966. By an order dated November 17, 1966, Mr. Justice Harlan extended the petitioners' time in which to file their petition for a writ of certiorari to and including December 19, 1966. The jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254 (1).

Questions Presented

1. Do not the federal wagering tax statutes here involved violate the petitioners' privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70 (1965), overrule *United States* v. *Kahriger,* 345 U.S. 22 (1953) and *Lewis* v. *United States,* 348 U.S. 419 (1955)?

2. (Presented on behalf of petitioners Cafaro and Genetempo only.) May probable cause sufficient for the issuance of a search warrant for an apartment be found by a magistrate, in a gambling case, based solely on the visits of a person known or believed to have taken bets at other and different locations, without any showing of the existence of gambling activity or apparatus at the premises for which the warrant is issued?

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 4401(c) of Title 26 of the United States Code provides:

> "(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

Section 4411 of Title 26 of the United States Code provides:

> "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

Section 4412 of Title 26 of the United States Code provides:

> "(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—
>
> (1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter."

Section 7203 of Title 26 of the United States Code provides:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000,

> or imprisoned not more than 1 year, or both, together with the costs of prosecution."

Section 7262 of Title 26 of the United States Code provides:

> "Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000."

Statement

Petitioners Serao, Cafaro and Genetempo were each convicted of one count of failing to pay the special tax imposed on persons engaged in receiving wagers on behalf of a person engaged in the business of accepting wagers, 26 U.S.C. §§ 4411, 4401, and of one count of failing to register as required by 26 U.S.C. 4412. Petitioner Serao was sentenced to six months imprisonment on each count, the sentences to run concurrently; petitioner Cafaro was sentenced to one year's imprisonment, the sentences to run concurrently; petitioner Genetempo was sentenced to one year on each count, the sentences to run concurrently, and fined five thousand dollars.

Factually, the Government's case was this: Serao, using the *nom de guerre* Joe Carroll, made the acquaintance of Treasury Intelligence Agent Brown in a Manhattan tavern and thereafter Brown placed bets with Carroll. At first these were placed in person, then later by telephone to three varying telephone numbers. If the statutes are constitutional, the conviction of Serao (Carroll) must stand. One of those who received the agent's telephone bets was the peti-

tioner Cafaro, and this was established at trial by identification of betting records in his handwriting, seized pursuant to search warrants. One of those warrants, which we assert was invalid, was for a so-called "tally room" on West 87th Street in New York, leased by petitioner Genetempo and in which betting records in Genetempo's handwriting were found. The mysteries of horse and sports betting were explained by Treasury Intelligence Agent Cotter, who testified that bets were commonly taken over the telephone at "wire rooms" and in due course entered into accounting records called tally sheets at locations where there were no telephones, known as tally rooms, which were presumably kept without telephones to minimize the likelihood of detection. Pre-trial, Judge McGohey dismissed motions to suppress on the grounds that movants Cafaro and Genetempo lacked standing to attack the warrant for the 87th Street tally room. During the course of the trial it was developed by the witness Battan (T. 193-198)* that Genetempo had rented the tally room and that some writings in Cafaro's hand were recovered from the tally room and that Cafaro was seen at the tally room. Accordingly Judge McMahon reconsidered the questioned of the warrants on the merits and once again sustained them (A. 28-38).* The Court of Appeals in its opinion, *infra* pp. 18-20, affirmed the validity of the warrant for the 87th Street tally room, which was the only warrant we attacked in that court and the only warrant which we attack here. Such additional facts as are required for the consideration of our attack on the warrant are set out in our discussion of that point below.

---

* Numbers in parentheses preceded by A. refer to appellants' joint appendix in the court below, filed as part of the record with this court, and those preceded by T. refer to the stenographic transcript of the trial.

Reasons for Granting the Writ

A. The statutes under which the petitioners were convicted are unconstitutional.

After this case was tried, but before it was argued, this Court granted certiorari in *Costello* v. *United States,* No. 826 of the October 1965 Term, 34 LW 3320 (3-22-66), and our first question closely parallels the question as to which this Court granted certiorari in the *Costello* case. After the instant case was argued, but before it was decided, this Court granted certiorari in *Grosso* v. *United States,* 35 LW 3109 (10-11-66). The Court of Appeals summarily rejected our attack on the statutes and our suggestion that it defer decision until this Court's resolution of the *Costello* case. We very much desire an opportunity to brief and argue this question on the merits. We respectfully suggest to this Court that these statutes mock the vitality and reality of the Fifth Amendment privilege, in favor of a fiction which effectively brings the Federal Government into the enforcement of local sumptuary laws against gambling. The net effect of this is not, so far as may be determined, to inhibit gambling (a probably impossible objective), but merely to erode an important constitutional privilege and lessen the public respect for the enforcement of the federal criminal law.

B. The warrant for the search of the 87th Street tally room was obtained in violation of the Fourth Amendment standards.

According to the testimony which was presented at the trial, but not to the Commissioner who issued the search warrant for the 87th Street tally room, the tally room functioned as a place where accounting records were kept, tally sheets. Accordingly the warrants for the wire rooms, which

we do not attack, were based on affidavits (A. 15, 19, 23) each of which contained the flat assertion that an agent had placed a bet, or bets, over telephones located in the premises sought to be searched, and from this the Commissioner might reasonably infer that at those very places there were people taking bets, and perhaps even that the people in those premises were in the business of taking bets. The warrant for the 87th Street premises, the so-called tally room, proceeds, however, on a wholly different theory, which we may call that of "portable" or "contagious" probable cause. The affidavit in support of the warrant is set out below.* (A. 11) An examination of that affidavit

---

* UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

Commissioner's Docket No. 2
Case No. 492

In the Matter of an Application for a Search Warrant affecting Apt. B, 327 West 87st St., New York, New York

AFFIDAVIT FOR SEARCH WARRANT

BEFORE HON. FRANK R. ABBOTT, U. S. Courthouse, Foley Sq., New York, N. Y.

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) Apt. B, 327 West 87th Street, New York, New York in the Southern District of New York, there is now being concealed certain property, namely gambling paraphernalia, including but not limited to horse betting slips, baseball and bas' et ball slips, other sporting slips and money, which are being used as means of committing a criminal offense, to wit, the business of accepting and receiving wagers, in violation of 26 U.S.C. §§4401, 4411, 4412 and 7272,

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: testimony of Special Agents of the Internal Revenue Service: 1. Who have placed wagers by telephone at 3 different locations hereinafter referred to as wire-rooms, with an individual known as Joe Carroll. 2. Who observed

discloses immediately, first, the absence of any allegation that bets were placed by phone at that location, second, the fact that the Government had observed the inside of the apartment sought to be searched (Allegation 4 in affidavit for warrant) and seen Carroll inside but does not allege the observation of any gambling paraphernalia or apparatus. The Court of Appeals concluded that the challenge to the adequacy of the affidavit would have "some validity if the application to search the West 87th Street apartment had been the only application in this matter presented at this time to the U.S. Commissioner" but in view of the other applications to search the "wire rooms" concluded that the attack was "hypertechnical". (Appendix A, *infra*, p. 20) Genetempo, the renter of the apartment, was never seen at any of the wire rooms, and there is no such allegation in any of the applications to that effect, and indeed there is no trial testimony to that effect. There is no allegation in the warrant for the 87th Street premises that any of the persons claimed to be seen coming from the wire rooms carried any records or papers or paraphernalia, nor is there any allegation in any of the other warrant applications that persons were seen going from the places sought

---

said Joe Carroll on 4 occasions proceeding from the aforesaid wire-rooms to the premises at 327 West 87th St. 3. Who observed 2 unknown individuals leaving 2 different wirerooms premises and who were on several occasions observed entering the premises at 327 West 87th St. 4. That Joe Carroll was observed inside Apt. B at 327 West 87th St. 5. That a search of the records of the Internal Revenue Service reveal that the said Joe Carroll has not paid the special tax imposed by 26 U.S.C. §4411.

/s/ DAVID A. OSTRAGER
Special Agent

Sworn to before me, and subscribed in my presence, March 21, 1963.

/s/ FRANK R. ABBOTT
United States Commissioner

to be searched under the other warrants to the 87th Street premises with any papers or other apparatus. Much of the matter relied on by the Court of Appeals was simply not in the affidavits before the Commissioner (A. 15, 19, 23). What those affidavits establish is indeed established by the affidavit in the application for the search of the 87th Street premises, that is to say that Carroll, who was taking bets elsewhere, was visiting those premises. The affidavit for the 93rd Street warrant (A. 15) does not give any date for the placing of bets, the affidavit for the search of the 89th Street premises does not give any date for the placing of bets (A. 19), nor does the application for the 90th Street premises (A. 23) give any date. The application for the search of the 87th Street premises does not give any date for the observed visits of the contaminating Carroll-Serao, so that there was no basis for the Commissioner to assume in terms of time that Carroll's visits to 87th Street were necessarily or even probably connected with bookmaking or gambling activity in which he had just engaged.

Of equal importance and significance, the Commissioner, who was supposedly exercising his common sense, was as a matter of logic required to have a special knowledge of the nature of gambling and the relationship between so-called wire rooms and tally rooms. That such knowledge is not a matter of common sense is obvious. The Government apparently thought so, for in the course of the trial it put Agent Cotter on and qualified him as an expert witness in order that he might explain these terms to the jury (T. 262-263).

This case represents a serious erosion of the standards for the issuance of search warrants. The only probable

cause which existed, so far as the Commissioner knew from all the affidavits before him when he issued the warrants, was that which adhered to the person of Carroll in the wire rooms, and which was carried like a contagious disease and spread by Carroll to the 87th Street premises. If the warrants here are sustained, a householder who wishes to be free from search must not only prohibit the entry of contraband and the conduct of illegal activity in his home, he must also deny access to his house to anyone who does wicked things at other places. It will not be enough for the householder to judge from the conduct of his visitor or the paraphernalia on his visitor's person, he must inspect his visitor's character. Indeed in this case Agent Ostrager's affidavit reveals that the Government looked into the 87th Street premises and observed Carroll, and since they failed to mention observing any gambling apparatus or paraphernalia one may reasonably infer that there was none to be seen. But the Government knows, and apparently persuaded the Commissioner, that as a man thinketh in his heart, so is he, and so becometh the places he visits.

A comparison of the affidavit here with the affidavit sustained by this Court in *United States* v. *Ventresca,* 380 U.S. 102 (1965), is most illuminating. The affidavit in *Ventresca* which is set out as an appendix to the opinion of the Court, *ibid.* 112-116, occupies slightly over four pages in the printed report of the case and details with the greatest specificity the transfer of bags of sugar and large metal cans, relates the aroma of fermenting mash and states that sounds emanating from the cans were "consistent with that of cans containing liquid." These observations were directly connected with the premises which were the subject of the

warrant and fairly led to the conclusion that what was going on in those premises was an illegal still operation. The affidavit related specifically the coming and going of the paraphernalia of that operation from the premises sought to be searched.

The task of the judicial officer before whom an application for a search warrant is made is to make an independent judgment of its sufficiency. The rule was succinctly stated in *Giordenello* v. *United States*, 357 U.S. 480, 486 (1958):

> "The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime."

We respectfully submit that the language of this Court in striking down the search warrant in *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964), is most pertinent:

> "The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'
>
> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones* v. *United States*, 362 U. S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where

> he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf* v. *United States*, 376 U.S. 528, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' *Giordenello* v. *United States, supra,* at 486; *Johnson* v. *United States, supra,* at 14, or, as in this case, by an unidentified informant.
>
> We conclude, therefore, that the search warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause and that the evidence obtained as a result of the search warrant was inadmissible in petitioner's trial."

We recognize that the mere fact that a case has been wrongly decided, even when the decision is as egregiously wrong as the upholding of the warrant here, does not in and of itself justify review by this Court. However, in the area of fundamental constitutional guarantees, like the Fourth Amendment's guarantee against unreasonable searches and seizures, the vitality of this Court's rulings can easily be undermined by decisions which give niggardly application to the protections of the Constitution.

We reiterate our request for an opportunity to brief and argue the constitutionality of the wagering tax statutes.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
ROBERT KASANOF
Attorneys for petitioners

December 1966

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 12—September Term, 1966.

(Argued September 19, 1966 Decided October 20, 1966.)

Docket No. 30548

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH SERAO, CHARLES CAFARO and BENJAMIN GENETEMPO,

Appellants.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and ANDERSON, *Circuit Judges.*

Appeals from convictions, United States District Court for the Southern District of New York, MacMahon, *J.*, with jury, for wilful failures to comply with gamblers' business tax and gamblers' registration requirements, 26 U. S. C. §§4411, 4412, 4401, 7203. Convictions affirmed.

DANIEL R. MURDOCK, MICHAEL W. MITCHELL, Asst. U. S. Attorneys, Robert M. Morgenthau, U. S. Attorney, Southern District of New York, *for Appellee.*

ALBERT J. KRIEGER, ROBERT KASANOF, New York City, *for Appellants.*

WATERMAN, *Circuit Judge*:

Appellants Serao, Cafaro, and Genetempo appeal from judgments of conviction entered against them after a jury returned verdicts that they were "wilfully guilty" of wilful failure to pay a special tax imposed on persons engaged in receiving wagers on behalf of one engaged in the business of accepting wagers, 26 U. S. C. §§4411, 4401, and wilful failure to register as required by 26 U. S. C. §§4412, 7203.

Appellants were involved in a bookmaking operation by which bettors made wagers over the telephone. The telephones of the bookmakers, the "wire room," were located at three New York City apartments, Apt. 11 at 329 W. 89th, 3B at 261 W. 90th, and 1AA at 255 W. 93rd Streets. The record-keeping part of the business was carried on in a fourth apartment, Apt. B at 327 W. 87th Street, the "tally room," which contained no telephone. Special agents of the Internal Revenue Service, after placing bets with Serao in person, called them in to telephones located in the three "wire room" apartments, whose numbers Serao gave them. The appellants were observed on different occasions going to and departing from the four apartments. On March 5,

1963, Serao was observed walking from the W. 93rd Street apartment to the W. 87th Street apartment. On March 11, Genetempo and Cafaro (twice) were seen entering the W. 87th Street apartment; on his second trip Cafaro was seen carrying a brown paper bag. On March 13, Genetempo was seen leaving and later reentering the W. 87th Street apartment; and still later Cafaro arrived there carrying a brown paper bag. On March 14, Genetempo was observed leaving and reentering the W. 87th Street apartment and Serao was seen to leave the W. 90th Street apartment, to drop a brown paper bag containing gambling paraphernalia into a trash can, and later to go into the W. 87th Street apartment. On March 16 and 18, Serao was watched while entering the W. 90th Street apartment. On March 19, Serao and Genetempo were seen together at the W. 87th Street apartment. Under fictitious names the W. 93rd Street apartment and the W. 87th Street apartment were leased by Cafaro and Genetempo respectively.

Warrants were thereafter obtained to search the four apartments for gambling paraphernalia and to arrest Serao, who was known to the government agents as Joe Carroll. The apartments were searched and a sizeable amount of gambling paraphernalia was seized.

All appellants challenge the constitutionality of the statutes under which they were convicted. We rejected such attacks in *United States* v. *Costello,* 352 F. 2d 848 (2 Cir. 1965), *cert. granted,* 383 U. S. 942 (1966), and *United States* v. *Conti,* 361 F. 2d 153 (2 Cir. 1966), and we likewise reject this one. This is the only contention advanced by appellant Serao, and his conviction is affirmed. We now discuss other

contentions advanced by appellants Cafaro and Genetempo.

Genetempo and Cafaro challenge the propriety of the issuance on March 21, 1963 of the search warrant authorizing a search of the W. 87th Street apartment. They each claim that the supporting affidavit of the special agent who applied for the warrants was insufficient. The affidavit is set forth herein in full:

AFFIDAVIT FOR SEARCH WARRANT

BEFORE HON. FRANK R. ABBOTT, U. S. Courthouse, Foley Sq., New York, N. Y.

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) Apt. B, 327 West 87th Street, New York, New York in the Southern District of New York, there is now being concealed certain property, namely gambling paraphernalia, including but not limited to horse betting slips, baseball and basket ball slips, other sporting slips and money, which are being used as means of committing a criminal offense, to wit, the business of accepting and receiving wagers, in violation of 26 U. S. C. §§4401, 4411, 4412 and 7272,

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: testimony of Special Agents of the Internal Revenue Service: 1. Who have placed wagers by telephone at 3 different locations hereinafter referred to as wirerooms, with an individual known as Joe Carroll. 2. Who observed said Joe Carroll on 4 occasions pro-

ceeding from the aforesaid wirerooms to the premises at 327 West 87th St. 3. Who observed 2 unknown individuals leaving 2 different wirerooms premises and who were on several occasions observed entering the premises at 327 West 87th St. 4. That Joe Carroll was observed inside Apt. B at 327 West 87th St. 5. That a search of the records of the Internal Revenue Service reveal that the said Joe Carroll has not paid the special tax imposd by 26 U. S. C. §4411.

/s/ DAVID A. OSTRAGER
Special Agent

Sworn to before me, and subscribed in my presence, March 21, 1963.

/s/ FRANK R. ABBOTT
United States Commissioner

Appellants claim that this affidavit contains no basis for concluding that the visits to this apartment by "Carroll" and the others were not for innocent purposes unrelated to the activities at the other apartments. They also claim that the location of the wirerooms, the numbers and dates of bets placed at each, and the dates upon which the surveillance of the appellants took place should have been specified in the affidavit.

Appellants' challenge to the adequacy of the affidavit might perhaps have some validity if the application to search the W. 87th Street apartment had been the only application in this matter presented at this time to the U. S. Commissioner, but under the circumstances of the present case there is no merit whatever to appellants' claims. On the same day that this application was made,

the same special agent presented to the same U. S. Commissioner applications for warrants to search the three "wireroom" apartments and to arrest Joe Carroll. These four other warrants were issued and their issuance is not challenged here. The U. S. Commissioner in issuing the challenged warrant could surely consider the facts he contemporaneously learned from the affidavits presented to him in support of these other applications, all of which contained references to Joe Carroll and to the bookmaking operation. See *United States* v. *Markis,* 352 F. 2d 860, 864 (2 Cir. 1965). Even if it be assumed that the so-called essential facts that appellants claim are missing from the challenged affidavit are wanting, one easily infers from the affidavit, standing alone, that the Commissioner had probable cause to believe that Joe Carroll's trips and those of the other two individuals from the wirerooms to the W. 87th Street apartment bore a direct relationship to the wireroom activities. And, most assuredly, the Commissioner, in making his independent judgment as to the sufficiency of the affidavit submitted in support of the application to search the suspected W. 87th Street apartment, could quite reasonably infer that very likely in this apartment was that part of the appellants' operation that was being conducted away from the wirerooms. It would be hypertechnical for the Commissioner not to act upon an entire picture disclosed to him in interrelated affidavits presented to him on the same day. And, as the United States Supreme Court admonished in *United States* v. *Ventresca,* 380 U. S. 102, 109 (1965), "the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner."

Appellant Cafaro claims his rights under the Fifth and Sixth Amendments were violated by the Government's introduction into evidence of a handwriting sample procured from him after his arraignment. The sample was one of two handwriting specimens used by the Government as a standard for comparing Cafaro's handwriting with the handwriting on the gambling records seized.

The sample was obtained when the Internal Revenue Service began a routine investigation of Cafaro's income tax returns after his arrest in this case on March 22, 1963. As part of this investigation, the Service sent a form to Cafaro on April 19, 1963, after the Service was unable to find that Cafaro had filed a federal income tax return for the calendar year 1961 in either the Manhattan District or the Brooklyn District. The form requested that an explanation be made on the back side of it, and, in his own handwriting, Cafaro wrote such an explanation. Cafaro was not required to write an answer; his voluntary reply could have been typed, written by someone else for him, or he could have made no answer at all.

Aside from the fact that Cafaro was under no compulsion to give the handwriting sample, he has no claim that his constitutional rights have been infringed. The Supreme Court in *Schmerber* v. *California*, 384 U. S. 757 (1966) limited the Fifth Amendment privilege to evidence of a testimonial or communicative nature. While Cafaro's writing was communicative for another purpose it was used here merely as a handwriting standard for identification, not to communicate any information related to the issues being tried. Obviously, there is no merit to the claim that a constitutional right of Cafaro was infringed by this vol-

untary act of his. Even identification procedures requiring fingerprinting or the giving of blood samples do not infringe. The Court noted in *Schmerber, supra* at 764, that "both federal and state courts have usually held that [the privilege against self-incrimination] offers no protection against compulsion . . . to write . . . for identification." As Cafaro was deprived of no rights under the Fifth Amendment, presence of his counsel would have availed him nothing. He therefore has no Sixth Amendment claim. *Schmerber* v. *California, supra* at 765-66.

Appellant Genetempo claims that the evidence was insufficient to sustain his conviction because it does not show that he performed other than mere ministerial or clerical duties. See *United States* v. *Calamaro*, 354 U. S. 351 (1957). We find no merit in this contention. The evidence is clearly sufficient to allow a finding that he performed more than a mere ministerial or clerical function. In fact, it would support a finding that he was supervising the whole operation. By the nature of the bookmaking operation the apartment which Genetempo leased under a false name and which he was often observed entering and leaving was the center of the operation. The wagers received at the various wire-rooms were taken to this "tally room" to be recorded. Several hundred of the summary sheets reflecting the credit of the bettors and the earnings of the operation seized at the tally room were in Genetempo's handwriting as were also a number of bet slips and even a summary sheet seized at the W. 93rd Street apartment.

The convictions of all three appellants are affirmed.

APPENDIX B

Judgment of United States Court of Appeals

UNITED COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of October one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH SERAO, CHARLES CAFARO, BENJAMIN GENETEMPO,
Defendants-Appellants,

ARMAND ROMANELLI,
Defendant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment of United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A DANIEL FUSARO
Clerk

APPENDIX C

Opinion by McGohey, D.J. on Pre-trial Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 CR. 773

UNITED STATES OF AMERICA

v.

JOSEPH SERAO, CHARLES CAFARO, BENJAMIN GENETEMPO and ARMAND ROMANELLI,

Defendants.

MEMORANDUM AND ORDER

The United States Attorney has filed an information charging that the defendants being "engaged in the business of accepting wagers and in receiving wagers for and on behalf of a person engaged in the business of accepting wagers," failed to pay the special tax imposed by law and failed to register as required by law with the official in charge of the internal revenue district. The defendants have moved for bills of particulars and the suppression as evidence of certain property seized in four separate apartments.[1] The papers raise no issue of fact as to the latter motions. Accordingly, no hearing has been held.

1. Two identical motions were filed; one on behalf of Serao and Cafaro, the other on behalf of Genetempo and Romanelli. The supporting affidavits are by counsel. No affidavit by any defendant has been filed. The motion were argued as one.

The government has consented to furnish the particulars specified in the first and third demands. It is directed to furnish the particulars specified in the second demand also.

It is not disputed that on March 21, 1963, a United States Commissioner in this district issued a warrant for the arrest of "Joe Carroll," now known to be the defendant Serao, and four search warrants for premises severally described as "Apt. 3 B, 261 West 90th Street, New York," "Apt. 11, 329 West 89th Street, New York, New York," "Apt. 1 AA, 255 West 93rd Street, New York, New York," and "Apt. B, 327 West 87th St., New York, N. Y." Each warrant was based upon an affidavit of Special Agent David Ostrager of the Internal Revenue Service.

On the following day, March 22, 1963, pursuant to the warrant issued for the arrest of "Joe Carroll," the defendant Serao was arrested in apartment 1 AA, 255 West 93rd Street. The apartment was searched at the same time and certain property allegedly used to conduct gambling operations was seized. No other defendant claims to have been in that apartment at the time of the search or at any other time; and no defendant claims an interest of any kind in that apartment or its furnishings or any of the property seized in it.

The apartments described in the other search warrants also were searched on March 22. There is no claim that any defendant was in any of these apartments at the time it was searched or at any other time. Moreover, there is no claim that any defendant ever had or now has an interest of any kind in any of these apartments, or in its furnishings or any of the property seized therein.

It is clear from the foregoing that the only defendant who can claim to be "a person aggrieved"[2] by any of the searches is Serao; and even he can make such claim only with respect to the search of apartment 1 AA at 255 West 93rd Street in which he was arrested.[3] It is contended that the affidavit on which the warrant for the search of that apartment was issued was insufficient to justify the Commissioner's conclusion that there was probable cause for its issuance. The contention is rejected.

The affidavit which, as noted above, was made by a Special Agent of the Internal Revenue Service, states that "the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: testimony of Special Agents of the Internal Revenue Service: 1. Who placed wagers at telephone number AC 2-7926. 2. That the aforesaid telephone number was supplied to a Special Agent by an individual known as Joe Carroll for the purposes of placing wagers. 3. That investigation has disclosed that telephone number AC 2-7926 is installed at Apt. 1 AA at 255 West 93rd Street, New York, New York. 4. That a search of the records of the Internal Revenue Service revealed that neither the person known as Joe Carroll nor any other person residing at Apt. 1 AA at 255 West 93rd Street, New York, New York had paid the special tax imposed by 26 U.S.C. §4411." That affidavit was clearly sufficient to support the Commissioner's conclusion as to

---

2. Rule 41(e) of the Federal Rules of Criminal Procedure.

3. Jones v. U. S., 362 U.S. 257, 261.

probable cause.[4] But even if it were not, the search was nevertheless lawful, being incident to Serao's arrest which was made pursuant to an arrest warrant as to which no challenge of any kind has been made.

The motions for particulars are severally granted to the extent indicated. Otherwise they are severally denied.

The motions to suppress are severally denied.

So Ordered.

Dated: New York, N. Y., November 12, 1963.

/s/ JOHN F. X. MCGOHEY
U. S. D. J.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

JOSEPH PERRO, GRAHAM CHARD AND BENJAMIN CHESTERO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

THURGOOD MARSHALL,
Solicitor General

PAUL M. TURNER, JR.,
Assistant Attorney General

ROBERT ROSENBERG,
BRUCE A. TURNER,
Attorneys

Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 869

JOSEPH SERAO, CHARLES CAFARO and BENJAMIN GENETEMPO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of wilful failure to pay the special occupational tax imposed by 26 U.S.C. 4411 on persons who receive wagers on behalf of persons engaged in the business of accepting wagers, and with failing to register with the Internal Revenue official

in charge of their district as required by 26 U.S.C. 4412, in violation of 26 U.S.C. 7203. On January 11, 1966, petitioner Serao was sentenced to concurrent terms of imprisonment of six months on each count; petitioner Cafaro to concurrent terms of one year; and petitioner Genetempo to concurrent terms of one year and a $5,000 fine. The court of appeals affirmed (Pet. App. 15-22).

1. Although the issue was apparently not raised in the district court, petitioners challenge the constitutionality under the Fifth Amendment of the statutes under which they were convicted. Since that issue is presently before this Court in *Marchetti* v. *United States*, No. 38, this Term, we suggest that it would be appropriate to defer action on the petition until decision by this Court in that case.

2. Petitioners Cafaro and Genetempo also challenge the validity of an affidavit supporting a warrant for the search of premises at 327 W. 87th Street. The sufficiency of the affidavit was upheld by the district court and the court of appeals, and presents no issue warranting review by this Court.

On March 21, 1963, an Internal Revenue Service Agent named Ostrager swore out four affidavits before a United States Commissioner in support of warrants to search four apartments believed to be used in accepting wagers and keeping records thereof without paying the required tax (A. 9a-24a).[1] The affidavits relating to three of the apartments, identical in form, stated that the affiant had reason to believe that gam-

[1] "A." refers to appellants' appendix in the court of appeals.

bling paraphernalia being used in the illicit business of accepting wagers was being concealed on the premises.[2] The grounds for that belief were set forth as follows:

> [T]estimony of Special Agents of the Internal Revenue Service:
>
> 1. Who placed wagers at telephone number * * *.
> 2. That the aforesaid telephone number was supplied to a Special Agent by an individual known as Joe Carroll[3] for the purposes of placing wagers.
> 3. That investigation has disclosed that telephone number * * * is installed at [the premises desired to be searched] * * *.
> 4. That a search of the records of the Internal Revenue Service revealed that neither the person known as Joe Carroll nor any other person * * * had paid the special tax imposed by 26 U.S.C. § 4411.

The affidavit with relation to the apartment at 327 W. 87th Street—the one challenged here—recited:

> And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: testimony of Special Agents of the Internal Revenue Service: 1. Who have placed wagers by telephone at 3 different locations hereinafter referred to as wirerooms, with an individual known as Joe Carroll. 2. Who observed said Joe Carroll on 4 occasions proceeding

---

[2] The addresses and telephone numbers of the premises described were different.

[3] Joe Carroll was the assumed name of petitioner Serao.

> from the aforesaid wirerooms to the premises at 327 West 87th St. 3. Who observed 2 unknown individuals leaving 2 different wirerooms [sic] premises and who were on several occasions observed entering the premises at 327 West 87th St. 4. That Joe Carroll was observed inside Apt. B at 327 West 87th St. 5. That a search of the records of the Internal Revenue Service reveal [sic] that the said Joe Carroll has not paid the special tax imposed by 26 U.S.C. § 4411.

Petitioners Cafaro and Genetempo claim that the allegation in the affidavit that Joe Carroll and two "unknown individuals" went to the W. 87th St. apartment after leaving one or other of the wire rooms did not establish probable cause to believe that these visits bore any relation to illegal activities occurring at the searched premises.[4] However, as the court of appeals held, the Commissioner could quite reasonably infer that the trips of Carroll and the two unknown individuals between the wire rooms and the

---

[4] The evidence at trial, which is not at issue, showed that one Brown, a United States Treasury Intelligence Agent, placed bets with Serao (the latter using the name Joe Carroll) and also called in bets to telephone numbers (given to him by Serao) located in three "wire room" apartments (Pet. App. 16). It is conceded by Serao that if the federal wagering tax statutes are constitutional, his conviction must stand (Pet. 5). Gambling paraphernalia linking Cafaro and Genetempo to the unlawful betting activity was found at the "tally room" at 327 W. 87th St. (*i.e.*, the place where records of bets were kept) as a result of the search there conducted (A. 10a). Cafaro and Genetempo were, under fictitious names, the lessees, respectively, of one of the wire rooms and the tally room. Cafaro was observed carrying brown paper bags to the 87th St. apartment (Pet. App. 16-17).

searched apartment were in connection with wire room business. Moreover, the Commissioner could properly look to the other affidavits filed simultaneously with the one in question in considering whether probable cause existed that the W. 87th St. apartment was involved in an illegal betting operation. See *United States* v. *Markis*, 352 F. 2d 860, 864 (C.A. 2).[5] These affidavits strengthened the basis for belief that the W. 87th St. apartment was involved in the gambling operation by supporting the assertion in the affidavit in question that Carroll, who had been seen proceeding from the wire rooms to the 87th St. premises, had supplied a federal agent with telephone numbers at three different wire room locations for the purpose of placing bets.

Petitioners also contend that the affidavits unreasonably presupposed knowledge by the United States Commissioner of the relationship in gambling enterprises between "wire" rooms and "tally" rooms (Pet. 10). However, no such particular knowledge was either presumed or was necessary. The Commissioner had merely to infer that the W. 87th St. apartment was linked with the wire rooms (sufficiently described as places to which bets were telephoned) as part of an illegal gambling operation. The affidavit to search the 87th St. apartment, taken either alone

---

[5] Petitioners do not argue to the contrary (see Pet. 9-10). Indeed, as the court of appeals found, (Pet. App. 20) a contrary holding would represent a "hypertechnical" rather than a commonsense approach to the question of probable cause and would thus be at odds with *United States* v. *Ventresca*, 380 U.S. 102, 109.

or in conjunction with the affidavits submitted in relation to the wire room apartments, contained sufficient facts to enable him to make that determination.

It is therefore respectfully submitted that, as to this issue, the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

JANUARY 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 243278 528

SUPREME COURT, U. S.
FILED
JUL 15 1967
JOHN F. DAVIS, CLERK

No. 374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

SAMUEL WRIEOLE,
Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Criminal Action.
On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Sat below:
McLaughlin, Hastie and Freedman, Circuit Judges.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ANSCHELEWITZ, BARR & ANSELL,
Attorneys for Defendant-Petitioner,
513 Bangs Avenue,
Asbury Park, New Jersey.

S. M. CHRIS FRANZBLAU,
Attorney for Defendant-Petitioner,
1180 Raymond Boulevard,
Newark, New Jersey.

ROBERT I. ANSELL, ESQ.,
On the Brief.

MacCrellish & Quigley Co., Printers, Trenton, New Jersey

TABLE OF CONTENTS.

	PAGE
Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ:	
I—Certiorari should be granted to permit this defendant to join in the presently existing attack on the Federal Wagering Tax Statutes	11
II—The government failed to prove the defendant to be a principal in a gambling operation and this Court should assume jurisdiction to clarify the burden of the government under the Federal Gambling Tax Statutes	12
III—The decision below upheld an unreasonable search on the basis of principles of law governing arrest extant in New Jersey, which principles are contrary to the fundamental criteria of the Fourth Amendment	16
Conclusion	23

CASES CITED.

PAGE

Albertson v. Subversive Activities Control Board, 382 U. S. 70, 15 L. Ed. 2d 165, 86 S. Ct. 194 (1965) 2

Brinegar v. United States, 338 U. S. 160, 176 (1949) ... 23

Costello v. United States, 383 U. S. 942, 16 L. Ed. 2d 205 (1966) 11

De Pater v. United States, 34 F. 2d 275, 276-277 (4th Cir. 1929) 22

Evans v. United States, 349 F. 2d 653, 656-657 (5 Cir. 1965) 13

George v. United States, 346 F. 2d 137, 138-139 (9th Cir. 1965) 13

Grosso v. United States, 385 U. S. 810, 17 L. Ed. 2d 53 (1966) 11

Henderson v. United States, 12 F. 2d 528 (4th Cir. 1926) 23

Jones v. United States, 357 U. S. 493, 499, 2 L. Ed. 2d 1514 (1958) 21, 22

Ker v. California, 374 U. S. 23, 33, 10 L. Ed. 2d 726, 738 (1963) 21

Lee v. United States, 232 F. 2d 354, 355-356 (D. C. Cir. 1956) 22

Lewis v. United States, 348 U. S. 419, 99 L. Ed. 475, 755 S. Ct. 415 (1955) 2

Marchetti v. United States, —— U. S. ——, 17 L. Ed. 2d 540 (1966) 11

Mc Knight v. United States, 183 F. 2d 977-978 (D. C. Cir. 1950) 22

Preston v. United States, 376 U. S. 364, 367, 11 L. Ed. 2d 777 (1964) 21

PAGE

State v. Contursi, 44 N. J. 422, 209 A. 2d 829 (1965) 16, 18, 20

State v. Romeo, 43 N. J. 188, 203-206, 203 A. 2d 23 (1964) 16, 18, 19

United States v. Calamaro, 354 U. S. 351, 356, 360, 1 L. Ed. 2d 1394 (1957) 13, 14

United States v. Di Re, 332 U. S. 581, 589, 92 L. Ed. 210, 217 (1948) 18, 23

United States v. Jeffers, 342 U. S. 48, 51, 96 L. Ed. 59 (1951) 21

United States v. Kahriger, 345 U. S. 22, 97 L. Ed. 754, 73 S. Ct. 778 (1953) 2

United States v. Kowal, 197 F. Supp. 401, 404 (D. R.I. 1961) 23

United States v. Lassoff, 147 F. Supp. 944, 953 (D. Ky. 1957) 23

United States v. Manos, 340 F. 2d 534, 538 (3rd Cir. 1965) 13

United States v. Nicholas, 224 F. Supp. 310 (W. D. Pa. 1963) 13, 15

United States v. Pepe, 198 F. Supp. 226, 227-228 (D. Del. 1961), affirmed, 339 F. 2d 264 (3rd Cir. 1964) ... 13

United States v. Pollack, 64 F. Supp. 554, 558 (D. N. J. 1946) 23

United States v. Sully, 56 F. Supp. 942 (S. D. N. Y. 1944) 23

Worthington v. United States, 166 F. 2d 557, 566-567 (6th Cir. 1948) 22

CONSTITUTION, STATUTES AND OTHER AUTHORITIES CITED.

	PAGE
United States Constitutional Amendments:	
Fourth	3, 23
Fifth	3
Tenth	3
Fourteenth	3
26 U. S. C., Section 4401	3, 12, 13
26 U. S. C., Section 4411	3, 12, 13
26 U. S. C., Section 4412	3, 12, 13
26 U. S. C., Section 7203	3, 4
26 U. S. C., Section 7262	3, 4
28 U. S. C., Section 1254(1)	2
Revised Rules of the U. S. Supreme Court: Rules 23, 4	11

APPENDIX.

Opinion Below	1a
Judgment	11a
Statutes Involved	12a
United States Constitutional Provisions Involved	15a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

SAMUEL WRIEOLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Samuel Wrieole, your Petitioner, prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above-entitled cause on June 16, 1967.

Opinions Below

The opinion of the Honorable Gerald McLaughlin, Circuit Judge, United States Court of Appeals for the Third Circuit, has not been reported. It is set forth at p. 1a of the Appendix hereto.

The opinion of the Honorable Arthur Lane, J.D.C., on the issue of search and seizue is set forth at R31a, 8-34a, 40.*

* The letter "R" refers to the record of this matter set forth in the Appendix to defendant's brief in the U.S. Court of Appeals for the Third Circuit.

Jurisdiction

1. The judgment of the United States Court of Appeals for the Third Circuit was entered on June 16, 1967, and is final by its terms.

2. (a) The issue of the constitutionality of the Federal gambling tax statutes was raised at the trial level by motion to dismiss the Information (R35a) and in defendant's brief in the United States Court of Appeals for the Third Circuit (DB32*).

(b) The search and seizure issue was raised at the trial level by a motion to suppress evidence (R5a) and in defendant's brief in the United States Court of Appeals for the Third Circuit (DB16-26).

3. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Do not the Federal gambling tax statutes here involved violate the Petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this Court, especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 15 L. Ed. 2d 165, 86 S. Ct. 194 (1965), overrule *United States* v. *Kahriger,* 345 U.S. 22, 97 L. Ed. 754, 73 S. Ct. 778 (1953) and *Lewis* v. *United States,* 348 U.S. 419, 99 L. Ed. 475, 75 S. Ct. 415 (1955)?

2. Did the Government introduce sufficient evidence upon which the jury could rationally find beyond a reasonable doubt that the defendant was a principal in a gambling operation and should not this Court review the sufficiency of the evidence to more definitely clarify the burden of the Government under the gambling tax statutes?

---

* The letters "DB" refer to defendant's brief in the United States Court of Appeals for the Third Circuit.

3. Was not the search of the defendant and seizure of evidence from him unreasonable and should not this Court channel the development of the law of search incident to arrest in New Jersey within the framework of the fundamental criteria laid down by the Fourth Amendment and opinions of this Court?

Statutory Provisions Involved

1. 26 U.S.C., Section 4401. (12a)
2. 26 U.S.C., Section 4411. (12a)
3. 26 U.S.C., Section 4412. (13a)
4. 26 U.S.C., Section 7203. (13a)
5. 26 U.S.C., Section 7262. (14a)

Constitutional Provisions Involved

1. The Fourth Amendment to the Constitution of the United States (15a)

2. The Fifth Amendment to the Constitution of the United States (15a)

3. The Tenth Amendment to the Constitution of the United States (15a)

4. The Fourteenth Amendment to the Constitution of the United States (15a)

Statement of the Case

This is a criminal action in which defendant was convicted of willful failure to pay the special occupational tax imposed by 26 U.S.C. 4411 and of willful failure to supply the registration information required by 26 U.S.C. 4412. The trial herein was held before the Honorable Arthur S. Lane, Judge, United States District Court, and a jury on May 17, 19, and 20, 1966 in the United States District Court, District of New Jersey, Trenton vicinage.

The Government proceeded herein by way of a three-count information (R3a-R4a) charging the above-described violations contrary to the provisions of 26 U.S.C. 7203 (R3a, 24-R4a, 21) and the lesser included offense of simple failure to pay the occupational tax in violation of 26 U.S.C. 7262 (R3a, 6-21). A verdict of not guilty was returned on the last mentioned charge (R2a, 22).

Defendant was taken into custody on December 16, 1964. At that time, Special Agents Michael Duffy and Irving Dubow were executing a warrant for the arrest of one Michael Delloiacono (R14a, 34-41) and a search warrant for premises owned by him and known as Mike's Sugar Bowl (R15a, 3-6; R20a, 36-41). They, and other law enforcement officials (R12a, 6-14), were assisted in that endeavor by Detective John Mazekian of the New Jersey State Police (R7a, 4-21). They found some five to eight individuals on the premises, the defendant among them (R10a, 39-41; 7a, 33-34; 18a, 26-32; 19a, 5-8; 21a, 24-25; 26a, 30-31). He was directed by Mazekian to empty his pockets (R12a, 3-8) and placed the contents thereof on a counter in the store (R12a, 29-30; R17a, 2-5). The agents allegedly seized a "rundown sheet" and currency in excess of seven hundred dollars (R17a, 5-7; 71a, 25-29). They also searched the defendant's car (R27a, 27-28), the person of one Russell Miraglia (R12a, 29-30), Miraglia's car (R27a, 19-20), the car of one of the other men found on the premises (R27a, 4-11), and the persons of the men in the store at the time of the raid (R71a, 5-10). These actions were all taken without benefit of a search warrant (R6a, 28-30; R27a, 25-26; R27a, 29-30). Only Delloiacono, the defendant, and Miraglia were arrested (R26a, 31-32). The agents found approximately $1,400 and a schedule of basketball games on the person of Miraglia (R12a, 22-25).

The defendant moved to suppress the evidence so seized (R5a). The above facts were established at a hearing on the motion held on February 15, 1965 (R6a-R34a). At that hearing, the following testimony was also adduced.

Trooper Mazekian testified that he entered Mike's Sugar Bowl at 11:00 A.M., made a brief search, advised the occupants of his purpose, and directed the defendant, among others, to empty his pockets (R7a, 24-31; R8a, 2-5; R12a, 2-7). Prior to the raid, he had been told by federal agents that a gambling operation was being conducted at Mike's Sugar Bowl and that bets had been made there (R8a, 24-31; 12a, 40-13a, 5). He did not know the name of the person who had given him that information (R13a, 4-5). His "purpose there was to effect any State arrest as the situation may warrant after the raid was in progress." (R8a, 37-39).

There was no testimony by Mazekian that he had expected to find the defendant on the premises. He ascertained the defendant's identity during the raid (R8a, 4-5; 11a, 22-24). At that time, he realized that he had been involved in a gambling raid in Long Branch, New Jersey in 1962 or 1963 in which the defendant was arrested (R8a, 18-22). On cross-examination, Mazekian admitted that he did not know whether the defendant had been convicted of the offense for which he had been arrested, or, in fact, whether he had been charged with a crime (R10a, 10-17).

Special Agent Duffy testified that he was executing the arrest warrant for Delloiacono and the search warrant for the premises (R14a, 34-15a, 5). Issuance of the warrants resulted from information supplied by a government investigator, James A. Taylor, that he had placed numerous bets with Delloiacono (R15a, 2-15; 16a, 15-21). Duffy added that Taylor had also reported that he (Taylor) had "observed a man fitting the description of Sam Wrieole accept a wager two days prior to the raid." (R16a, 21-23). Duffy did not see the defendant being searched (R16a, 39-17a, 2), but first observed him after the contents of his pockets were present on the store counters (R17a, 2-6; 19a, 12-16). The defendant was one of the five or six persons on the premises at the time of the execution of the Delloiacono warrants (R18a, 27-32).

Special Agent Dubow also testified at the hearing on the motion to suppress. He stated that there was a file on the defendant in the Intelligence Division, but did not disclose the contents thereof (R23a, 6-7). Defendant had an arrest record, and had been seen on a daily basis at Mike's Sugar Bowl between the hours of 11:00 A. M. and 1:00 P. M. (R23a, 8-10, 29-36). These hours were stated to be "the critical wagering period." (R23a, 32.) He conceded that they also constituted lunch time (R25a, 29-30). He further testified that he had received information from an undercover agent that a person fitting the description of the defendant had accepted a bet two days before the raid (R23a, 37-39).

The motion to suppress evidence was denied in an oral opinion from the bench (R31a, 9-34a, 41), as was a motion to dismiss the Information based on the unconstitutionality of the Federal gambling tax statutes (R35a, 1-20; R1a, 18-20).

Trial of the within matter was commenced on May 19, 1966. The Government's first witness, one Sadie Rosen, testified that she was employed by the Internal Revenue Service as a returns coordinator in Newark and that a check of the records of her department revealed no special occupational tax return or registration information filed by the defendant (R39a, 20-40a, 20). This was conceded by the attorney for the defendant on opening to the jury.

Cross-examination as to the qualifications of James A. Taylor, Jr. and Irving Dubow, agents of Internal Revenue called by the Government, produced the following description of a typical gambling operation. It is headed by a "banker", the person in charge who bears the financial burden and risk of loss (R44a, 27-30, 37; R60a, 30-34; R68a, 14-18, 27-30). Contact with the bettor is made by the "writer", also called "bookmaker", who initially records the wager (R42a, 3-5; R68a, 4-5, 38-39). The wager is transferred to the control of the banker by a "runner"

who physically picks up the bets of the bookmaker (R42a, 30-35), or through a "sitter", who receives relays over the telephone (R68a, 6-7). The operation employs various clerks (R45a, 30; R69a, 3-4), errand boys and hangers-on (R16a, 2-4, R69a, 16—R70a, 13), and someone known as a "controller" who is responsible for the collection and distribution of funds in a particular geographic area (R45a, 27-35; R69a, 7-15). The agents indicated that a numbers operation is almost invariably set up along the foregoing lines (R44a, 24—R45a, 20), but that in a horse-race operation conducted on a small scale, these functions can be consolidated (R42a, 18-22; R68a, 15-16). The agents did not indicate how to determine whether a writer or bookmaker was independent or part of the larger operation. Their testimony further indicated that a wagering operation involved a substantial amount of paper work and bookkeeping (R42a, 36—R43a, 3; R55a, 19-42; R60a, 12-21; R62a, 8-25).

Returning to the specific facts of the instant matter, Taylor testified that in the course of his duties as investigator assigned to the Intelligence Division, he was present on the premises known as Mike's Sugar Bowl on six occasions during the month of December 1964 (R40a, 34-37; R46a, 23-35). On several of these occasions he observed the defendant in the store (R47a, 6-12). On December 3rd, he saw the defendant talking with two men and heard names he recognized as the names of horses (R49a, 18-21). On December 4th, he observed the defendant come out of a telephone booth making notations on a 3 x 5 pad (R50a, 24-30). On December 7th or 9th, he observed the defendant repeat the name of a horse on the telephone and emerge from the booth making a notation (R50a, 32—R51a, 3).

Taylor stated that he saw the defendant on one other occasion. On December 15th, he observed a man emerge from a telephone booth, give the defendant a slip of paper and say "Four dollars on Powan." (R51a, 21-37.) The defendant was said to have placed the slip in his pocket (R51a, 39-40).

Taylor was asked to identify a slip of paper, later admitted into evidence as G-1 (R98a, 29-32) and identified as having been seized from the person of the defendant (R71a, 30-35). He stated (R57a, 4-5):

> "This is the type slip a banker *or* a bookmaker *or* a bet controller usually has in his possession . . .". (Emphasis added.)

On cross-examination, Taylor conceded that only the incident of December 15 was mentioned in a report drawn by him covering each day's activities during December (R59a, 7-11). The report was drawn up at the end of each day of investigation (R58a, 36-37), but did not include a notation of any of the activities allegedly observed by Taylor on December 3rd, 4th, 7th or 9th (R59a, 7-25). He stated further that he had no direct knowledge of the source of Exhibit G-1 (R60a, 10-12).

Special Agent Dubow again testified concerning his participation in the raid of December 16th. At the trial, as opposed to the hearing on the motion to suppress (R26a, 36-38), Dubow was able to recall that all of the persons on the premises were searched (R71a, 5-10). He restated his observation of the search of the defendant (although he did not make it) (R71a, 22-23), and testified that the defendant possessed an amount of currency in excess of $700 and the slip of paper identified as G-1 (R71a, 25-35). He explained that G-1

> " is what I would call a ribbon or a settlement sheet. The ribbon is referred to in the parlance of the gambling circles as a settlement sheet between a principal *or* someone who has to account for the moneys and the bettors or other writers." (R72a, 4-9.) (Emphasis added.)

After explaining some of the notations on the sheet, Dubow expressed his opinion that such an item would customarily

be carried by a "bookmaker." (R73a, 4-8). He had previously defined that term as a writer who has contact with a bettor (R68a, 4-5, 38-39).

On cross-examination, Dubow agreed that he had given no figure on G-1 which corresponds to the sum of money carried by the defendant (R75a, 13-22). He gave the defendant a receipt for the money seized from him (R80a, 24-25), but did not give the defendant a receipt for G-1 (R80a, 18-19). He agreed that "it would be generally accepted standard" to give a receipt for property of any kind, whether money, papers, or keys, taken from a person during a search (R80a, 39-R81a, 6).

At the end of the Government's case, the defendant moved for judgment of acquittal on the ground that the government had failed to produce sufficient evidence from which the jury might rationally conclude beyond a reasonable doubt that the defendant was engaged in the business of accepting wagers on his own behalf. The motion was denied (R94a, 20-R98a, 17).

The first witness for the defendant was one Anthony Wrieole, who identified himself as a nephew of the defendant (R99a, 16-17). He testified that the defendant was unable to read or write (R99a, 20-21), and that he (Anthony), throughout his life, had had to read his report cards, magazine articles and mail to the defendant (R100a, 2-8; R101a, 34-39).

The final witness for the defendant was Dr. James B. Spradley, a psychiatrist licensed to practice medicine in 1919 (R108a, 2-4). His qualifications appear on Page 108a of the Record.

Dr. Spradley examined the defendant on May 18, 1966 (R108a, 40-R109a, 4), and as a result thereof, reached the following conclusion (R109a, 13-17):

> "He is a mentally-retarded individual, and his retardation is to the level that we call a moron, as his

intelligence quotient, based upon 100 percent, is between 65 and 70. He is unable to read. He is unable to write."

After setting forth the basis of his opinion (R109a, 20-R110a, 26), the doctor opined that the defendant is incapable of writing down the name of a horse or a bettor (R111a, 20-30).

On the basis of the foregoing, the jury returned the verdict of guilty on Counts II and III of the Information. Defendant was sentenced on July 5, 1966, he was placed on probation, without supervision, for a period of five (5) years, received a term sentence which was suspended, and was ordered to pay a fine in the amount of $3,500.00 all of which had reference to the Second Count of the Information (R139a, 36-41). Sentence on the Third Count was suspended (R140a, 2-3). Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed on July 8, 1966 (R141a; R2a, 35), and an order staying judgment pending disposition thereof was entered on July 11, 1966 (R142a). Judgment was affirmed by the Court of Appeals on June 16, 1967 (11a). This Petition followed.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted to permit this defendant to join in the presently existing attack on the Federal Wagering Tax Statutes.

In *Costello* v. *United States,* 383 U.S. 942, 16 L. Ed. 2d 205 (1966), *Marchetti* v. *United States,* U.S. , 17 L. Ed. 2d 540 (1966), and *Grosso* v. *United States,* 385 U.S. 810, 17 L. Ed. 2d 53 (1966), this Court has granted petitions for writs of certiorari to consider the very question set forth as the first Question Presented in this Petition.

In view of the cases cited above, and in furtherance of the purposes of Rule 23, 4 of the Revised Rules of the Supreme Court of the United States, the Petitioner will assume that this Court is convinced of the importance of the question here presented and that there is some merit to the Petitioner's position on that question.

Petitioner respectfully submits that the outcome of the instant matter should be delayed to permit him to join in the pending attack on the validity of the federal gambling tax scheme. One need only postulate the denial of certiorari here today and a decision striking down the federal gambling tax statutes tomorrow to bring into sharp focus, the relief here sought. While a similar (albeit, not as striking) situation is unfortunately the result in many instances after decision by this Court, such a result *is* unfortunate and should be avoided if the Court can do so without substantial detriment to the entire system of jurisprudence.

The grant of the writ herein would not constitute a retroactive application of nor anticipate the decision of the court in the cases cited above. It would simply and equitably bestow upon Sam Wrieole the same opportunity to present the same meritorious position as the defendant's therein. Considerations of fundamental justice permit of no less.

II. The government failed to prove the defendant to be a principal in a gambling operation and this Court should assume jurisdiction to clarify the burden of the government under the Federal Gambling Tax Statutes.

Assuming that the statutes here attacked are ultimately to be upheld, then the issue of sufficiency of evidence implicated in this controversy acquires substantial importance. It is an issue which has not been, but should be ruled upon by this Court in concrete terms.

The Information filed by the Government and under which it proceeded in the trial of this matter contained three counts, each of which was grounded upon the substantive allegation that the defendant was "engaged in the business of accepting wagers". (R3a, 9-10, 27-28; R4a, 6-7). The quoted passage, of course, is found in the statutes which the Government alleged placed the tax and registration burdens upon defendant. 26 U. S. C. Sec. 4401 (c) ("Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him."); 26 U. S. C. Sec. 4411 ("There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under Section 4401 . . ."); 26 U. S. C. Sec. 4412 (a) ("Each person required to pay a special tax under this subchapter shall register . . .") It is defendant's position on this appeal that because of the use of the quoted clause in the information, it was the burden of the Government to prove beyond a reasonable doubt that the defendant was a "banker" in a gambling operation and that proof by the Government that the defendant was a "writer" or proof which did not provide the jury with a reasonable basis to conclude whether the defendant was a banker or writer was insufficient to satisfy its burden.

In short, it is defendant's position that a banker, and only a banker, is "a person engaged in the business of accepting wagers." While there can be no question but that

a "writer" in a gambling operation physically receives wagers, it is submitted that that occupation is not covered by the language of the statutes quoted above, but by that portion of the applicable statutes which impose liability upon a person "who receives wagers for or on behalf of another person. . . ." 26 U. S. C. Sec. 4401 (c); see, also, 26 U. S. C. Sec. 4411 (". . . or who is engaged in receiving wagers for or on behalf of any person" who is engaged in the business of accepting wagers.); see, also, 26 U. S. C. 4412 (a) (3).

The distinction between banker and writer has been firmly settled by this Court in *United States* v. *Calamaro,* 354 U. S. 351, 356, 360, 1 L. Ed. 2d 1394 (1957), and by lower federal courts. *United States* v. *Nicholas,* 224 F. Supp. 310 (W. D. Pa. 1963); *United States* v. *Pepe,* 198 F. Supp. 226, 227-228 (D. Del. 1961), affirmed, 339 F. 2d 264 (3rd Cir. 1964); *United States* v. *Manos,* 340 F. 2d 534, 538 (3rd Cir. 1965); *Evans* v. *United States,* 349 F. 2d 653, 656-657 (5 Cir. 1965); *George* v. *United States,* 346 F. 2d 137, 138-139 (9th Cir. 1965).

It has been the Government's practice to file six-count informations in cases such as that presently before the Court. Three of the counts charge that the defendant "engaged in the business of accepting wagers" (banker) and three charge that the defendant "received wagers for or on behalf of a person engaged in the business of accepting wagers." (writer) For reasons unknown to this defendant, the Government chose to prove him to be a banker by filing an information containing only three counts. That choice having been made, and with the foregoing authorities as foundation, the question under this heading becomes whether or not the Government proved or offered to the jury a rational basis for finding beyond a reasonable doubt that the defendant was a banker, a person who is "engaged in the business of accepting wagers' as a 'principal . . . on his own account.' " *United States* v. *Calamaro, supra* (354 U. S., at p. 360).

The testimony of the Government's experts in the instant matter agrees with the above classification of functions in a gambling operation, whether bookmaking or numbers, and is summarized at page 5 of the Statement of the Case herein.

Taking the Government's evidence at its best, it was shown that the defendant was present at Mike's Sugar Bowl on several occasions in December 1964, that he discussed horses in the luncheonette and over the telephone and sometimes made notations. On one occasion, he accepted a slip of paper from someone who said "Four dollars on Powan," and, at the time of the raid, was possesed of some $700 and G-1.

It is immediately apparent that proof of discussion of horses and, in fact, acceptance of a bet does not discharge the Government's burden. Such proof provides a point of departure, but must be coupled with evidence upon which the jury can conclude or from which the jury can rationally infer that the defendant was acting as a principal, i.e., on his own account. *United States* v. *Calamaro, supra.*

It is further apparent that this latter aspect of the Government's case was founded upon G-1, the adding machine tape seized from the defendant. The testimony from the Government's own witnesses, however, fell far short of supplying the jury a rational basis for concluding that the presence of that tape on the defendant was proof that he was a banker. Taylor, the undercover agent testified (R57a, 4-5):

> "This is the type of slip a banker *or* a bookmaker *or* a bet controller usually has in his possession. . . ." (Emphasis added.)

It is important to note that Taylor had previously defined "bookmaker" as a writer of bets (R42a, 3-5), who may, or may not be, working on his own account (R42a, 18-22). He offered no basis for determining whether a writer is or is not operating on his own account. A "bet controller" had

been previously explained by Taylor to be an employee responsible for the collection and distribution of funds in a particular geographical area (R45a, 27-35). Thus, Taylor's testimony simply established that the existence of G-1 on defendant indicated that the defendant was either a banker (liable for tax under the Information filed in this case), writer (liable for tax, but not under the Information filed in this case), or controller (not liable for tax).

Dubow was similarly unhelpful. He explained that G-1

> "... is what I would call a ribbon or a settlement sheet. The ribbon is referred to in the parlance of the gambling circle as a settlement sheet between a principal *or* someone who has to account for the monies and the betters *or* other writers." (R72a, 4-9) (Emphasis added.)

He stated that such an item would customarily be carried by a "bookmaker" (R37a, 4-8), a term he had previously defined as a writer who has contact with a better (R68a, 4-5, 38-39).

Thus, accepting every element of the Government's proof at face value, a trier of fact can only *wonder* which inference to make. Did G-1 show that defendant was a banker or principal? Or, did it show him to be a bet controller who had to account for monies from the principal to writers? Or did it show him to be a writer accounting for monies from his principal to betters?

While the inference that defendant was a banker is permissible *in vacuo*, a criminal case cannot be decided in that context. The jury must be offered some reason, i.e., evidence, to draw that inference as opposed to any other equally rational. As noted in *United States* v. *Nicholas*, *supra* (224 F. Supp., at p. 311):

> "The situation is the same as if a defendant were charged with adultery and fornication, and the proof merely showed sexual intercourse without indicating whether the parties were married."

One searches the record in vain to determine whether the defendant's acts constituted adultery or fornication, that is, banking or writing. That being so, it is respectfully submitted that the Government failed to prove the guilt of the defendant as charged beyond a reasonable doubt and the trial court's denial of defendant's motion for judgment of acquittal was error.

If the constitutionality of the federal gambling tax scheme is ultimately upheld by this Court, the question of the nature and quantum of proof required to sustain convictions becomes of great significance. It is suggested that this case presents an excellent vehicle for this Court to decide these issues for the first time.

III. The decision below upheld an unreasonable search on the basis of principles of law governing arrest extant in New Jersey, which principles are contrary to the fundamental criteria of the Fourth Amendment.

This case involves the validity of the search of a defendant prior to his arrest. It involves the search of five to eight persons present on premises to which the public was invited (R71a, 5-10) and the subsequent arrest of the only two upon whom items of an evidentiary nature were found. It involves a decision by the United States Court of Appeals for the Third Circuit that words of search ("Empty your pockets") constitute words of arrest, without mention of the necessary concomitant of special factual elements which would justify that transposition. It involves a consideration by this Court of the situation extant in New Jersey whereby an officer placing his hand on someone's shoulder and saying "you are under arrest" is held not to have effected an arrest at that time (*State* v. *Romeo*, 43 N.J. 188, 203-206, 203 A. 2d 23 (1964)), while an officer who approaches a man and utters no words of arrest but merely searches is held to have effected an arrest (*State* v. *Contursi*, 44 N.J. 422, 209 A. 2d 829 (1965)). One must assume the risk of understatement to suggest that there is an urgent

need for this Court to wade into this morass which clogs the proper development of the mainstream of search and seizure law in this country.

Defendant was taken into custody on December 16, 1964. At that time, Special Agents Michael Duffy and Irving Dubow were executing a warrant for the arrest of one Michal Delloiacono (R14a, 34-41) and a search warrant for premises owned by him and known as Mike's Sugar Bowl (R15a, 3-6; R20a, 36-41). They, and other law enforcement officials (R21a, 6-14), were assisted in that endeavor by Detective John Mazekian of the New Jersey State Police (R7a, 4-21). They found some five to eight individuals on the premises, the defendant among them (R10a, 39-41; 7a, 33-34; 18a, 26-32; 19a, 5-8; 21a, 24-25; 26a, 30-31). He was directed by Mazekian to empty his pockets (R12a, 3-8) and placed the contents thereof on a counter in the store (R12a, 29-30; R17a, 2-5). The agents allegedly seized a "rundown sheet" and currency in excess of seven hundred dollars from defendant (R17a, 5-7; 71a, 25-29). They also searched the defendant's car (R27a, 27-28), the person of one Russell Miraglia (R12a, 29-30), Miraglia's car (F27a, 19-20), the car of one of the other men found on the premises (R27a, 4-11), and the persons of the men in the store at the time of the raid (R71a, 5-10; 26a, 35-40). These actions were all taken without benefit of a search warrant (R6a, 28-30; R27a, 25-26; R27a, 29-30). Only Delloiacono, Miraglia and the defendant were arrested. (R26a, 31-32). The agents found approximately $1,400 and a schedule of basketball games on the person of Miraglia (R12a, 22-25).

Trooper Mazekian testified that he entered Mike's Sugar Bowl at 11:00 A.M., made a brief search, advised the occupants of his purpose, and directed the defendant and another to empty their pockets (R7a, 24-31; R8a, 2-5; R12a, 2-7). Prior to the raid, he had been told by federal agents that a gambling operation was being conducted at Mike's Sugar Bowl and that bets had been made there (R8a, 24-31; 12a, 40-13a, 5). He did not know the name of the person who

had given him that information (R13a, 4-5). His "purpose there was to effect any State arrest as the situation may warrant after the raid was in progress." (R8a, 37-39).

There was no testimony by Mazekian that he had expected to find the defendant on the premises. He ascertained the defendant's identity during the raid (R8a, 4-5; 11a, 22-24). At that time, he realized that he had been involved in a gambling raid in Long Branch, New Jersey in 1962 or 1963 in which the defendant was arrested (R8a, 18-22). On cross-examination, Mazekian admitted that he did not know whether the defendant had been convicted of the offense for which he had been arrested, or, in fact, whether he had been charged with a crime (R10a, 10-17).

Anyone looking for an arrest in the foregoing facts is faced with the immediate burden that one did not, at least by name, take place. Certainly, the trial court made no express finding on this issue and seems to have assumed that an arrest of the defendant occurred at some indeterminate time which was left undetermined (R34a, 30-37). The Government, meanwhile, had similar difficulties in this regard and it was not until the filing of an answering brief in the United States Court of Appeals for the Third Circuit that the Government seized upon the theory that Mazekian arrested the defendant when he told him to empty his pockets. It was upon this reed that the decision of the Court of Appeals was based.

The decision by the Court of Appeals that an arrest had taken place was based, as this Court has directed, upon the laws of arrest of the State of New Jersey. *United States* v. *DiRe,* 332 U.S. 581, 589, 92 L. Ed. 210, 217 (1948). The Court below relied upon *State* v. *Contursi, supra,* which, viewed in conjunction with *State* v. *Romeo, supra,* precisely demonstrates the need for some control by this Court of the principles governing the law of arrest.

In *State* v. *Contursi, supra,* municipal policemen entered a restaurant and observed the defendant in a telephone

booth. They recognized him as a person recently arrested as a participant in a dice game and as the subject of information received from reliable informers connecting him with illegal horse race gambling activities. The officers observed the defendant speaking on the telephone and holding a piece of paper in one hand. When the defendant observed the officers, he "stopped talking, hung up the receiver and slipped the hand which had been holding the paper under his left thigh between his leg and the booth seat." (44 N.J., at p. 427). As the defendant left the booth, one officer told him to empty his pockets, viewed the contents, took the defendant to police headquarters and charged him with bookmaking.

Defendant argued that he was not arrested before the search and that his subsequent arrest was improperly based upon the fruits of that search. The Supreme Court of New Jersey held: ". . . the arrest, in the connotation involved, legally took place by the command to disgorge the contents of the pockets and thus prior to the search, at which moment, as we have previously held, there was probable cause to arrest. . . . The restraint of the person and restriction of liberty of movement was sufficient . . . to constitute the arrest." (44 N.J., at p. 43).

In *State* v. *Romeo, supra,* a federal agent, executing a premises warrant for a store to which the public was invited, approached the defendant, asked him his name and then "'immediately . . . placed him under arrest and advised him of his constitutional rights.'" (43 N.J., at pp. 203-204). The Supreme Court assumed at that moment that there was no right to arrest the defendant without a warrant. Immediately following the foregoing, the defendant was observed reaching into a pocket, extracting a packet of papers, and throwing them toward the wall. Another agent recovered the packet, noted that they had to do with gambling, and directed the defendant to empty his pockets. Defendant was subsequently charged with bookmaking.

The defendant argued "that the original action of the agent constituted an arrest which was illegal . . . and that all the evidence which was the fruit of it . . . was unlawfully obtained and so inadmissible." (43 N.J., at p. 205). The Supreme Court of New Jersey held: ". . . despite the formal language of arrest used by the agent, his action should not be legally characterized as such in the usual sense, but rather considered simply as a justifiable temporary detention of this defendant during a raid. . . . So the packet tossed away by him almost immediately thereafter was not the fruit of an illegal arrest. . . ." (43 N.J., at p. 206). The second arrest, based upon the packet which had been tossed away, was upheld.

Thus, the same court which decided that the placing of a person under arrest and advising him of his constitutional rights is not "an arrest" for purpose of search and seizure law, also decided one year later that telling a person to empty his pockets involves sufficient "restraint of the person and restriction of liberty of movement . . . to constitute the arrest." *State* v. *Contursi, supra* (44 N.J., at p. 433). The only element which binds these two decisions is result; in the former the existence and in the latter the nonexistence of an arrest at a given point in time was essential to a result of a lawful search and seizure. Principle, of course, must be tempered by result, for only in that way can principle grow to meet the multi-faceted and ever changing demands of human relationships. To temper, however, is not to control. In a society based upon and devoted to perpetuation of the Rule of Law, principle has a value far beyond its immediate effect upon result.

The importance of sound principle in the area of the law of arrest cannot be underestimated. The validity and timing of an arrest will, of course, often control the validity of an "incidental" search. The role of principle is greatly magnified when it is considered that it is most often forged at the impetus of an obviously guilty defendant whose very role in the process creates substantial visceral barriers to

the impartial application of doctrine. And, the factor of arrest has significance beyond search questions. One need only postulate Mazekian not only telling defendant to empty his pockets, but, also, asking him what he was doing in the luncheonette, and receiving a damaging admission in response to that question. If the search had been fruitless, it would require no great effort of imagination to consider the Government and defendant exchanging positions and the former arguing that the command to empty pockets was an investigatory and not custodial detention.

This Court has firmly held that the Fourth Amendment requires adherence to judicial processes as a prerequisite to lawful search and seizure. *United States* v. *Jeffers,* 342 U.S. 48, 51, 96 L. Ed. 59 (1951); *Preston* v. *United States,* 376 U.S. 364, 367, 11 L. Ed. 2d 777 (1964). Search incident to arrest is an exception to this rule, an exception which has "been jealously and carefully drawn." *Jones* v. *United States,* 357 U.S. 493, 499, 2 L. Ed. 2d 1514 (1958). It is as much a subversion of the Constitution to call a search an arrest as it is to call an arrest warrant a search warrant. The courts of New Jersey and the Third Circuit, in turn, have actually equated search and arrest, for if the command "Empty your pockets" constitutes an arrest, it is difficult to conceive of a search of a person or search of premises with someone present that does not constitute an arrest. Every search in the presence of someone necessarily involves some limitation upon the freedom of that person.

While the States are free to "develop[e] workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement,'" those rules must comport with the "'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment." *Ker* v. *California,* 374 U.S. 23, 33, 10 L. Ed. 2d 726, 738 (1963).

The equation of search and arrest by the court below following the Supreme Court of New Jersey has validated

a search, the dominant motive of which was to secure evidence upon which to arrest the defendant. Mazekian's purpose was solely investigatory; he was there "to effect any State arrest *as the situation may warrant* after the raid was in progress." (R8a, 37-39) (Emphasis added). In fact, he did not permit "the situation" to "warrant" any action, for immediately upon entry he ordered the defendant to empty his pockets (R11a, 24-40). That Mazekian's purpose was investigatory and that he did not arrest the defendant is clear from his own testimony at the hearing on the motion to suppress (R11a, 30-40):

> "Q. Where were the defendants then? (11) A. Standing in the central part of the room.
>
> Q. You went up to them? A. Yes.
>
> Q. What did you say? A. Asked who they were. They told me. I advised one to go one way, one to stay where he was *so they could be searched further for identification and anything else* they may have had on their possession.
>
> Q. Then what? A. They complied with the request.
>
> Q. *That was it as far as you were concerned?* A. *Yes.*" (Emphasis added).

Mazekian's failure to arrest and his investigatory purpose bring his action in direct conflict with the fundamental criterion laid down in *Jones* v. *United States,* 357 U.S. 493, 2 L. Ed. 2d 1514 (1958). There, the Court found determinative the subjective premises upon which law enforcement officials acted and struck down a search made independent of arrest and for the sole purpose of discovering evidence (357 U.S., at p. 500). The lower federal courts have consistently applied this principle. See, *Lee* v. *United States,* 232 F. 2d 354, 355-356 (D.C.Cir. 1956); *DePater* v. *United States,* 34 F. 2d 275, 276-277 (4th Cir. 1929); *McKnight v. United States,* 183 F. 2d 977-978 (D.C. Cir. 1950); *Worthington* v. *United States,* 166 F. 2d 557, 566-567

(6th Cir. 1948); *Henderson* v. *United States*, 12 F. 2d 528 (4th Cir. 1926); *United States* v. *Kowal*, 197 F. Supp. 401, 404 (D. R.I. 1961); *United States* v. *Lassoff*, 147 F. Supp. 944, 953 (D. Ky. 1957); *United States* v. *Pollack*, 64 F. Supp. 554, 558 (D. N.J. 1946); *United States* v. *Sully*, 56 F. Supp. 942 (S.D. N.Y. 1944).

This principle is firmly grounded in reason. The policy of deterring police officers from engaging in unreasonable conduct is certainly not served by allowing them to engage in conduct which in their own minds is unreasonable or would be unreasonable if considered and by the condoning of such conduct on the basis of theory subsequently propounded by the United States Attorney. Assume the officer's "act of judgment" (*Brinegar* v. *United States*, 338 U. S. 160 176 (1949)) in this case to have been (as it undoubtedly was) the following: "I have no basis to arrest the suspect, but I will search him to see what I can discover." The Fourth Amendment must be applied to protect the public from this kind of thinking. Mazekian operated under the theory that he could enter a luncheonette which was being searched by federal officers and search each and every person on the premises "for identification and anything else they may have on their possession." (R11a, 35-37.) Cf., *United States* v. *DiRe*, 332 U. S. 581 (1948). The conflict of that kind of thinking with the Fourth Amendment is fundamental and should not be condoned to guide the actions of law enforcement officials in the future.

CONCLUSION

For the foregoing reasons and based on the foregoing authorities, Petitioner respectfully requests this Court to grant the Petition for Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ANSCHELEWITZ, BARR & ANSELL,
Attorneys for Petitioner.

By ROBERT I. ANSELL.

APPENDIX

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 16106

UNITED STATES OF AMERICA

v.

SAMUEL WRIEOLE,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued March 9, 1967

Before McLAUGHLIN, HASTIE and FREEDMAN, *Circuit Judges*

Opinion of the Court

(Filed June 16, 1967)

By McLAUGHLIN, *Circuit Judge.*

An information filed against appellant stated that he was engaged in the business of accepting wagers and therefore was liable for tax under Section 4401 of the Internal Revenue Code of 1954 (26 U.S.C. § 4401); that he was required to pay the special occupational tax under 26 U.S.C. § 4411 and failed to do so for the period stated; that he was required to supply registration information specified in Section 4412 of the 1954 Internal Revenue Code (26 U.S.C. 4412) and failed to do so for the said period.

Appellant was convicted, sentence was suspended; he was placed on probation and fined.

On appellant's behalf it is asserted that the trial court erred in denying the defense motion for acquittal made at the end of the Government's case. The defendant failed to preserve his right to question the sufficiency of the evidence by never renewing that motion. *United States* v. *Manos*, 340 F. 2d 534, 536-537 (3 Cir. 1955) and decisions there cited. In addition to that, our own examination of the record thoroughly satisfies us that there was sufficient evidence in the Government's proofs to justify appellant's conviction here as a principal or banker.

Appellant also argues that his arrest was illegal and that therefore the evidence on his person which he produced at the command of the then arresting officer, New Jersey State trooper Maziekien, was wrongfully obtained.

Appellant was arrested on December 16, 1964 in the course of a combined State and Federal raid of a store called "Mike's Sugar Bowl", Asbury Park, New Jersey. That place had been under surveillance by the Intelligence Division of the Internal Revenue Service since the preceding August. Regarding appellant, one Miraglia who was with him when he was arrested, and Delloiacono the owner of the store, Special Agent Dubrow, in charge of both the surveillance and the raid, testified at the hearing on motion to suppress the above mentioned evidence, about the Intelligence Division's knowledge of them as follows:

> "I knew Sam Wrieole and Russell Miraglia to have a background in wagering activity. The Intelligence Division files indicate these men to be involved in wagering. They also indicated that Miraglia and Wrieole had arrest records involving wagering activity or for wagering. We also had information from a confidential source that they were currently involved in wagering activity, and based upon the surveillance information that I received plus the information trans-

mitted by the undercover agent regarding the wagering activity on the premises, plus our prior investigation of September 1964, we believed that there was a gambling operation going on in those premises in which Miraglia, Wrieole, Delloiacono and others were involved in."

The raiding party had a search warrant for the premises and one of arrest for Delloiacono as owner. State trooper Maziekien, Detective, Second Class, of Criminal Investigation Section of the New Jersey State Police, was one of the raiding officers. He testified that his troop assignment included investigation of gambling activities. He was later joined at the raid by his commanding officers, Captain Dollar and Major Halley. He was asked *"What was the purpose of your accompanying the Federal agents on the raid?"* He answered *"My purpose there was to effect any state arrest as the situation may warrant after the raid was in progress.* Q. *For violations of what?* A. *The gambling laws of the State of New Jersey."* (Emphasis supplied.)

Respecting his knowledge of appellant and what had been going on at the Sugar Bowl prior to the raid, his following testimony is illuminative:

"Q. Did you know anything of the background of Mr. Wrieole? A. Yes, I did. In either '62 or '63 I was a party to a gambling raid in Long Branch where he was arrested?

Q. On what charge? A. Lottery.

Q. Did you know—pardon.

Were you advised as to what type of activity was conducted at Mike's Sugar Bowl? A. Yes, it was a Sugar Bowl but a front for gambling activity in that these persons would frequent here and visit here regularly.

Q. Were you told of any bets having been placed on the premises? A. Yes, I had been told bets were made in these premises.

Q. Who told you that? A. Agents of the Internal Revenue Service.

Q. When was that? A. That was the morning of the raid."

Trooper Maziekien was asked specifically:

"Directing your attention to December 16, 1964, did you participate in an arrest? A. *Yes, I did.* Q. *Could you tell us where that was?* A. *That was a luncheonette known as Mike's Sugar Bowl in Asbury Park, New Jersey.* Q. *Who was with you* A. *Agents of Internal Revenue Service."* (Emphasis supplied.)

*On cross-examination, the trooper was queried about what he did during the raid regarding appellant and Miraglia. He said he went up to them "Asked who they were. They told me. I advised one to go one way, one to stay where he was so they could be searched further for identification and anything else they may have had on their possession. * * * They complied with the request."* (Emphasis supplied). The Court said to the witness: "I see somewhere in the papers that somebody directed them to empty the contents of their pockets." The trooper answered, "Yes, I did." In response to more questions the trooper told how he had met the agents before the raid somewhere outside of Asbury Park and that *one of them advised him at that time "* * * that this Mike's Sugar Bowl was a front for a gambling operation." The agents told him "They were going to raid the premises, and my purpose in being there was to effect any State arrest."* (Emphasis supplied.)

It is admitted in appellant's brief that the arrest of Wrieole for possession of gambling paraphernalia (N.J.S.A.

2A:121–3) did not require that the offense be committed in the officer's presence.

Appellant would have it that under the above facts which were not contradicted the trooper did not arrest Wrieole. This is merely an assumption, unwarranted by the record and contrary to the New Jersey law which controls the State arrest. *United States* v. *Di Re,* 332 U.S. 581, 589 (1948); *United States* v. *Viale,* 312 F.2d 595, 599 (2 Cir. 1963). The late New Jersey Supreme Court decision in *State* v. *Contursi,* 44 N.J. 422, 433-434 (1965) is on all fours with our situation. There our problem was posed as follows: "The final query is whether there was an actual arrest of defendant at the time and by means of the order to empty his pockets." The Court said pages 433 and 434:

> "We have held, however, that where an arrest is valid independently of, and is not made to depend on, the search or its result, evidence produced by the search will not be suppressed merely 'because in precise point of time the arrest does not precede the search,' *State* v. *Doyle,* 42 N.J. 334, 343 (1964). But without resort to that rule, *we think here it is clear on the uncontradicted proofs that the arrest, in the connotation involved, legally took place by the command to disgorge the contents of the pockets and thus prior to the search, at which moment, as we have previously held, there was probable cause to arrest. It is true that the record does not show that any formal language of arrest was used, but that fact is not vital. The restraint of the person and restriction of liberty of movement was sufficient, in the circumstances (where the object was not merely to question), to constitute the arrest. State* v. *Doyle,* supra, 42 N.J., at p. 342; *Henry* v. *United States,* 361 U.S. 98, 80 S. Ct. 168, 4 L.Ed. 2d 134 (1959); cf. *Davis* v. *People of State of California,* supra, 341 F.2d 982 (9 Cir. 1965). In the Henry case the triggering act of the FBI agents was to stop a car in which the defendant was riding. Although probable cause to arrest

was found not to exist then, Mr. Justice Douglas said: 'When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete.' 80 S. Ct., at p. 171, 4 L.Ed, 2d, at p. 139." (Emphasis supplied).

Henry v. *United States*, 361 U.S. 98, 193 (1959) fully supports the proposition that the trooper did in fact and law arrest appellant. In Henry, the Court held and not as appellant asserts because the prosecution conceded it, "* * * that the arrest took place when the federal agents stopped the car. That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest for the purposes of this case was complete."

Our facts parallel those in Contursi. Wrieole, who is the only one of the three persons sought as principals with whom we deal in this appeal, had been known to the trooper for a year or more as a person involved in New Jersey illegal gambling. The trooper at first did not recognize Wrieole as one of the two men before him, but on the latter giving his name, the trooper did immediately identify him. It was directly thereafter that the trooper separated Miraglia and Wrieole so that they could be searched. The raid was a joint Federal and State operation. Trooper Maziekien, the specalist representing New Jersey, at the moment when he realized who Wrieole was, did, as he swore under oath, participate vitally in the arrest of the former. Later on the federal men did follow through by taking Wrieole into their own custody but the original restraint of Wrieole and restriction of his liberty of movement had been properly effected previously by the trooper under the governing New Jersey law.

The facts already related justify that arrest. The trooper had reliable information from the federal agents that the premises they were raiding was a gambling establishment. He saw the premises and the people thereon. As one of the

eye witnesses to that scene put it "the store itself was pretty bare of inventory as a going restaurant or candy store, and yet all these people were there at the critical hours, eleven to one." The trooper had been told by the agents that "bets were made on the premises." He went up to appellant and Miraglia, asked them who they were and they told him. We have seen that he knew enough about Wrieole's background to reasonably associate him with gambling in New Jersey. Regarding Miraglia, who was with appellant and was also arrested, the trooper said, "I knew that he had been arrested for gambling violations in 1948 at the Willows Hotel in Lakewood, and since I have been assigned to the Criminal Investigation Section, the name has been mentioned to me on several occasions in relation to gambling situations."

There cannot be any sincere knowledgable disagreement today on the law of probable cause for arrest. In *Brinegar* v. *United States,* 338 U.S. 160, 175-176 (1948) Mr. Justice Rutledge gives the alpha and omega of it in two fine paragraphs:

> " 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' *McCarthy* v. *De Armit,* 99 Pa. St. 63, 69, quoted with approval in the Carroll opinion. 267 U.S. at 161. And this 'means less than evidence which would justify condemnation' or conviction, as Marshall, C. J., said for the Court more than a century ago in *Locke* v. *United States,* 7 Cranch 339, 348. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

As set out in Brinegar and Carroll, supra, the trouble line can be that between mere suspicion and probable cause. Where it exists, as said in Brinegar, p. 176, "That line must necessarily be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances."

Wrieole had, within two years of this confrontation with the trooper, given the latter reasonable ground for believing he was tied into illicit gambling in the same area (Long Branch the locale of Wrieole's first arrest is a short distance from Asbury Park). Appellant's presence in the Sugar Bowl together with the facts that the trooper had before him when he saw Wrieole with Miraglia and the former identified himself, repeated even more strongly the substantial basis for trooper Maziekien believing that Wrieole was at the time engaged in forbidden gambling. See *United States* v. *Viale,* supra, p. 601. That justified belief and the existing circumstances not only failed to indicate that Wrieole was about lawful affairs but affirmatively cried out the unlawful nature of his business in the so called store.

The district judge as he stated, taking the collective impact of the trooper's testimony and that of the agents, made a "considered judgment" that probable cause existed for Wrieole's arrest. Quoting Brinegar, p. 177-178, "We cannot say this conclusion was wrong, or so lacking in reason and consistency with the Fourth Amendment's purposes that it should now be overridden." We find no genuine distinction between our situation and those in Brinegar and Carroll.

From all of the above we are convinced and so hold that the trooper had probable cause to believe Wrieole was violating the New Jersey statute prohibiting the possession of lottery paraphernalia. The trooper was familiar with the particular type of state offense. He did not obtain the identity of appellant and Miraglia as a result of searching them. He simply asked both who they were and they told him. With that information he recognized appellant as a person arrested on a similar charge a year or so previously. He also identified Miraglia as having been arrested in an earlier state gambling raid and who had been mentioned to the trooper on several occasions in relation to gambling situations. He had been reliably informed that the Sugar Bowl was just such an operation. The composite knowledge he had gave him reasonable grounds for believing that both men were concerned with the current Sugar Bowl gambling business in violation of both the New Jersey and Federal law.

We have especially stressed the completely lawful position of trooper Maziekien in making his arrest of Wrieole. That arrest was squarely before the trial judge on the trooper's testimony. The District Attorney during the cross-examination of the trooper addressed the judge as follows: "To clarify that, we are charging them with a Federal offense, which is different in substance than the State offense. However, we maintain that the probable cause was based upon probable cause to believe the State offense had been committed and was being committed." While the arrest by the trooper is the core of the issue in

this appeal, we also find correct the view of the trial court that the actions of the federal and state agencies were a combined law enforcement project and that the agents going into the raid had the requisite probable cause for legitimately arresting appellant and Miraglia for having violated or being in the course of violating the federal tax laws. Later on during the raid, after the state arrest by the trooper, the agents did take the two men into custody for the federal offense.[1] That arrest is categorically admitted by appellant.

Since, as we have found, the trooper arrested appellant, having probable cause for that arrest, the search of appellant's person was a lawful, reasonable incident to that arrest. *United States* v. *Rabinowitz*, 339 U.S. 56, 60 (1950); *Agnello* v. *United States*, 269 U.S. 20, 30 (1925).

The remainder of appellant's points have been carefully examined. They are without merit.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

---

[1] The federal agents who participated in the arrests of appellant and Miraglia had themselves much additional first-hand information obtained during their surveillance including inter alia the placing of more than thirty bets by one of the agents; of Wrieole accepting a bet at the Sugar Bowl just two days before the raid; that he and Miraglia had frequented the premises during the two-months period of the investigation. There were also descriptions of the telephones present, their heavy use; of the absence of store or restaurant equipment, etc. That evidence was first, ample to sustain the course of the agents in the raid of themselves taking over the custody of Wrieole for the federal misdemeanor and second, of primary importance in the trial proofs of that effense.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 16106

UNITED STATES OF AMERICA,

v.

SAMUEL WRIEOLE,

Appellant.

(D. C. Criminal No. 615-64)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ..... DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, HASTIE and FREEDMAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 8, 1966, be, and the same is hereby affirmed.

Attest:

THOMAS F. QUINN,
Clerk.

June 16, 1967.

STATUTES INVOLVED

Title 26

§ 4401. Imposition of Tax

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the making of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be extended.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. As amended Sept. 2, 1958, Pub.L. 85-859, Title I, § 151 (a), 72 Stat, 1304.

§ 4411. Imposition of Tax

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527.

§ 4412. REGISTRATION

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527.

§ 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a

misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

§ 7262. Violation of Occupational Tax Laws Relating To Wagering—Failure To Pay Special Tax

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000. Aug. 16, 1954, c. 736, 68A Stat. 862.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be used for public use, without just compensation.

Amendment X—Reserved Powers to States

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 374

SAMUEL WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner was convicted by a jury in the United States District Court for the District of New Jersey for willful failure to pay the special occupational tax imposed by 26 U.S.C. 4411 on those engaged in the business of accepting wagers, and for willful failure to register as one engaged in such business, as required by 26 U.S.C. 4412 (App. 3–4, 139).[1] On July 5, 1966, the trial judge awarded petitioner a suspended sentence, placed him on probation for five years, and fined him $3,500 (App. 139–140). The court of appeals affirmed (Pet. App. 1–10).

[1] "App." refers to appellant's appendix in the court of appeals, a copy of which is on file with the Clerk of this Court; "Pet. App." refers to the appendix to the instant petition.

275-257—67

1. The issue posed by petitioner (Pet. 2, 11) as to the constitutional validity, under the Fifth Amendment, of the special occupational tax on wagering and the registration requirement relating thereto (26 U.S.C. 4411–4412) is presently before the Court in *Marchetti* v. *United States*, No. 2, this Term, restored for reargument together with *Grosso* v. *United States*, No. 12, this Term. Accordingly, we suggest that action with respect to that issue be deferred until *Marchetti* and *Grosso* are decided. Since disposition as to the self-incrimination question raised here will probably be controlled by those cases, it seems appropriate to hold the instant petition pending argument and decision therein.[2]

2. There is, however, no merit to petitioner's remaining claims challenging the lawfulness of the search and seizure here involved and the sufficiency of the evidence generally.

a. At a pre-trial hearing on petitioner's motion to suppress evidence seized from him during a raid on the gambling premises, the following evidence was adduced:

From August 1964 until December 16, 1964, a luncheonette in Asbury Park, New Jersey, known as "Mike's Sugar Bowl", which was suspected of being a front for a lottery and horse-betting operation, was kept under surveillance by Internal Revenue agents (App. 20, 8, 12–13, 23, 27, 31–32). Agent Duffy testified at the hearing that, during this surveil-

[2] Although the self-incrimination question is not discussed in the court of appeals' opinion, that issue was raised in the district court by a motion to dismiss and appears to have been adequately preserved in the court of appeals (see Pet. 2).

lance, undercover agent Taylor placed some thirty bets at the "Sugar Bowl" (App. 14–15), and that, on December 14, 1964, while inside the luncheonette, Taylor saw a man fitting petitioner's description accept a wager (App. 16, 17–18).[3] The surveillance additionally revealed that petitioner and one Miraglia had come to the premises daily for two months during the "critical wagering period"—*i.e.*, between 11:00 a.m. and 1:00 p.m. (App. 23, 25). Internal Revenue Service files further showed that petitioner and Miraglia had arrest records for gambling and were believed to be engaged in wagering activities (App. 23).

On December 16, 1964, a federal search warrant was obtained for the luncheonette and an arrest warrant for the proprietor, Michael Delloiacono (App. 14–15, 20–21). At about 11:00 a.m. federal and State agents conducted a joint raid on the premises (App. 16, 21, 32). Just prior to the raid, the federal agents had told State officer Maziekien that the "Sugar Bowl" was a front for a gambling operation (App. 8, 12–13). Just after he entered, Maziekien saw petitioner and Miraglia standing in the main room and asked them to identify themselves (App. 7–8). When they did, he remembered that petitioner had been arrested in "either '62 or '63" during a State lottery raid in which the agent had participated, and that Miraglia had been arrested on State gambling offenses in 1948 (App. 8, 10, 11). At this point, Maziekien ordered the men to move "in two different"

[3] Taylor did not testify at the hearing on the motion to suppress; at trial he testified in detail to activities engaged in at the luncheonette by petitioner which he had witnessed (see *infra*, p. 6).

directions and to empty their pockets. Both complied (App. 8, 11, 12, 19). The contents of petitioner's pockets included over $700 in cash and an "adding machine type paper, bearing amounts and names" (App. 71). These items were thereafter taken into custody by the federal agents. Petitioner's motion to suppress the paper was denied by the trial court (App. 31–34).

As the foregoing recital demonstrates, while an unchallenged and warrant-based search of a premises reasonably believed to be a front for a gambling operation was going on, petitioner was spotted on the premises by a State agent who recognized him as having been previously arrested for a State gambling offense. This information was enough—as the court of appeals held (see Pet. App. 2–10)—"to warrant a prudent man in believing that the petitioner had committed or was committing an offense," and, hence, to justify petitioner's arrest and the incidental search of his person by the State officer. *McCray* v. *Illinois*, 386 U.S. 300, 304–305; *Brinegar* v. *United States*, 338 U.S. 160, 175–176; *Draper* v. *United States*, 358 U.S. 307, 310–312. Moreover, since the State agent was proceeding in conjunction with the federal officers, the information which the federal officers had, prior to their entry upon the premises, as to petitioner's previous gambling activities, was properly imputable to the State agent. Petitioner should not be allowed to benefit from the fortuitous circumstance that he was seen first by an agent whose personal knowledge of petitioner's illegal involvement was less substantial than the collective information

of other agents who either participated in the raid or in the surveillance which preceded it. See, *e.g.*, *Smith* v. *United States*, 358 F. 2d 833, 834–836 (C.A. D.C.); *Weise* v. *United States*, 251 F. 2d 867, 868 (C.A. 9), certiorari denied, 357 U.S. 936; *United States* v. *Bianco*, 189 F. 2d 716, 719 (C.A. 3); see also *United States* v. *Ventresca*, 380 U.S. 102, 111.

Nor is there any substance to the claim that, since agent Maziekien did not formally announce that petitioner was under arrest, the search which followed was unreasonable. So long as the agent had probable cause for petitioner's arrest when he acted to restrain his liberty of movement—as was plainly the case here—no ritual of words of arrest was needed to authorize his actions. *United States* v. *Baxter*, 361 F. 2d 116, 118–119 (C.A. 6), certiorari denied, 385 U.S. 834; *United States* v. *Thompson*, 356 F. 2d 216, 222 (C.A. 2), certiorari denied, 384 U.S. 964; *Dickey* v. *United States*, 332 F. 2d 773, 778 (C.A. 9), certiorari denied, 379 U.S. 948; *United States* v. *Boston*, 330 F. 2d 937, 939 (C.A. 2), certiorari denied, 377 U.S. 1004; see also *Henry* v. *United States*, 361 U.S. 98, 103.*

* Petitioner's discussion of two New Jersey Supreme Court decisions which he asserts are essentially in conflict (see Pet. 16–23) hardly provides a basis for further review on this particular point. Here the court of appeals took into account the decision in *State* v. *Conturzi*, 44 N.J. 422, 208 A. 2d 829, which followed *Henry* and similar federal court decisions, and which was closely parallel factually with respect to the circumstances surrounding the arrests made in each case (see Pet. App. 5–6). That another New Jersey case might possibly be viewed as in some respects in conflict with *Conturzi* does not mean that the court below improperly made reference to that decision.

b. Petitioner's contention (Pet. 14–16) that the evidence failed to establish that the petitioner was the principal in the gambling business is insubstantial. Under the unambiguous instructions of the trial judge, the jury was authorized to convict petitioner only if it found that he was the principal in the gambling enterprise—*i.e.*, "the man * * * running the show" (App. 136–137, 131–132). The jury's conclusion that petitioner fell into that category finds ample support in the record of trial.

Undercover agent Taylor testified at trial that he saw petitioner at the luncheonette on at least four separate occasions in early December 1964, shortly before the December 16 raid. Petitioner's activities, as witnessed by Taylor, included reading racing forms discussing horses, accepting telephone calls with respect to horses, and making notations on 3 x 5 pads following these telephone conversations (App. 48–51). On December 15 Taylor witnessed another person answer the telephone at the luncheonette and then come over to petitioner, hand him a slip of paper and state, "Four dollars on Powan". Petitioner acknowledged the information and put the slip of paper in his pocket (App. 51–52). The paper found on petitioner's person on the date of the raid was described by agent Taylor as the "type slip a banker or a bookmaker or a bet controller usually has in his possession," the names and figures on which indicated the "financial indebtedness to be paid by * * * the operator of the entire unit" (App. 57, 58). Agent Dubow, who was in charge of the raid, testified that the paper was "a settlement sheet between a principal or someone who has to account for the moneys and the bettors or other

writers" (App. 72), and that it would be "customarily" in the possession of a "bookmaker" (App. 73).[5] There was further testimony that, although petitioner had $715 in cash in his possession at the time of the raid (App. 71, 88, 93), when asked what he did for a living, he stated that he was "self-employed", doing odd jobs "including the cleaning of cellars and the cutting of lawns" (App. 87).[6] The evidence also showed that petitioner had never paid the special occupational tax or provided any registration information concerning his gambling activities (App. 39–40). Viewed in terms most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, this evidence supported the jury's finding that petitioner was a principal in the gambling operation. *United States* v. *Calamaro*, 354 U.S. 351, relied upon by petitioner (Pet. 13–14), is thus inapposite.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

SEPTEMBER 1967.

[5] Undercover agent Taylor and agent Dubow both qualified as experts in the operations of gambling businesses (see App. 40–41, 66–67).

[6] Before making these responses to the federal agents, petitioner had been advised of his constitutional rights (App. 85). Defense counsel had "no objection" to the introduction of these statements into evidence at trial (App. 86).

U.S. GOVERNMENT PRINTING OFFICE: 1967

Office-Supreme Court, U.S.
FILED
DEC 18 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

~~No. 1028 Misc.~~ No. 2 Misc.

ARTHUR GJANCI

Petitioner

-v.-

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Carroll W. Brewster
Kimberly B. Cheney
205 Church Street
New Haven, Connecticut

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 1028 Misc.

ARTHUR GJANCI

Petitioner

-v.-

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner, Arthur Gjanci, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered on October 29, 1965.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, is printed in the Joint Appendix to the petitions of co-defendants, James Marchetti and Frank Costello (Jt. App. 1a). The opinions in U. S. A. v. Piccioli, Docket No. 29521 in the Court of Appeals, and U. S. A. v. Grassia, Docket No. 29791 in the Court of Appeals, related cases, are also printed in the Joint Appendix (Jt. App. 16a-29a).

Jurisdiction

The judgments of the Court of Appeals were entered on October 29, 1965. Petitioner's petition for rehearing was denied on November 26, 1965 (Pro. Ct. App. 123). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Should United States v. Kahriger, 345 U. S. 22 (1953), and Lewis v. United States, 348 U. S. 419 (1955), upholding the constitutionality of the wagering tax laws here involved, be reconsidered by this Court in the light of recent decisions?

2. Assuming, arguendo, the continued validity of cases upholding the constitutionality of the wagering tax laws, were the statutes applied and enforced against petitioner in an unconstitutional manner or so as to violate the proper standards for the enforcement of federal criminal law under this Court's supervisory powers?

3. Did the use, without proper objection at trial, of petitioner's self-incriminatory oral and written post-indictment statements deliberately elicited from him without warning as to his right to counsel vitiate petitioner's convictions?

Constitutional and Statutory Provisions Involved

Petitioner maintains that the judgments of the court below, affirming his convictions for violations of the wagering tax laws and the federal conspiracy statute, violate his rights under the Fifth, Sixth and Tenth Amendments of the United States Constitution. The wagering tax laws, 26 U. S. C. §§ 4401, 4411 and 4412, and the constitutional provisions involved, together with general revenue laws relating to these cases, are set forth in the Joint Appendix to this petition (Jt. App. 29a).

Statement
and
Reasons for Granting the Writ

Petitioner faces a one-year prison sentence and a $2,500 fine for convictions by a jury presided over by Chief Judge Timbers of the United States District Court for the District of Connecticut upon two indictments charging willful violations of the wagering tax statutes and the federal conspiracy statute (Jt. App. 3a).

The case of petitioner Arthur Gianci involves questions identical or closely related to those raised in the petition for writ of certiorari of his co-defendant James Marchetti. Therefore, pursuant to Rule 23(5) of the Rules of the Supreme Court of the United States Arthur Gianci hereby adopts the STATEMENT AND REASONS FOR GRANTING THE WRIT contained in the petition of James Marchetti. Arthur Gianci also adopts the Joint Appendix of his co-defendants James Marchetti and Frank Costello.

CONCLUSION

For these reasons, then, this Court should--and petitioner requests that it does--issue its writ of certiorari to review the judgments of the court below.

Respectfully submitted,

Carroll W. Brewster
205 Church Street
New Haven, Connecticut

Kimberly B. Cheney
205 Church Street
New Haven, Connecticut

Counsel for Petitioner

December 16, 1965

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

PICCIOLI *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 4. Decided March 4, 1968.*

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments of the courts below are vacated, and the cases are remanded for further consideration in the light of *Marchetti* v. *United States*, 390 U. S. 39.

MR. JUSTICE MARSHALL took no part in the consideration or decision of Nos. 2 Misc., 4, 5, 6, 10, 32 and 374.

---

*Together with No. 5, *Millo* v. *United States;* No. 6, *Grassia* v. *United States;* No. 10, *Driscoll et al.* v. *United States;* No. 32, *Serao et al.* v. *United States;* No. 374, *Wrieole* v. *United States;* and No. 2, Misc., *Gjanci* v. *United States*, all on petitions for writs of certiorari. Nos. 5, 6, 32, and 2, Misc., are to the United States Court of Appeals for the Second Circuit, No. 374 to the Third Circuit, and No. 10 to the First Circuit. The motion for leave to proceed *in forma pauperis* in No. 2, Misc., is also granted.